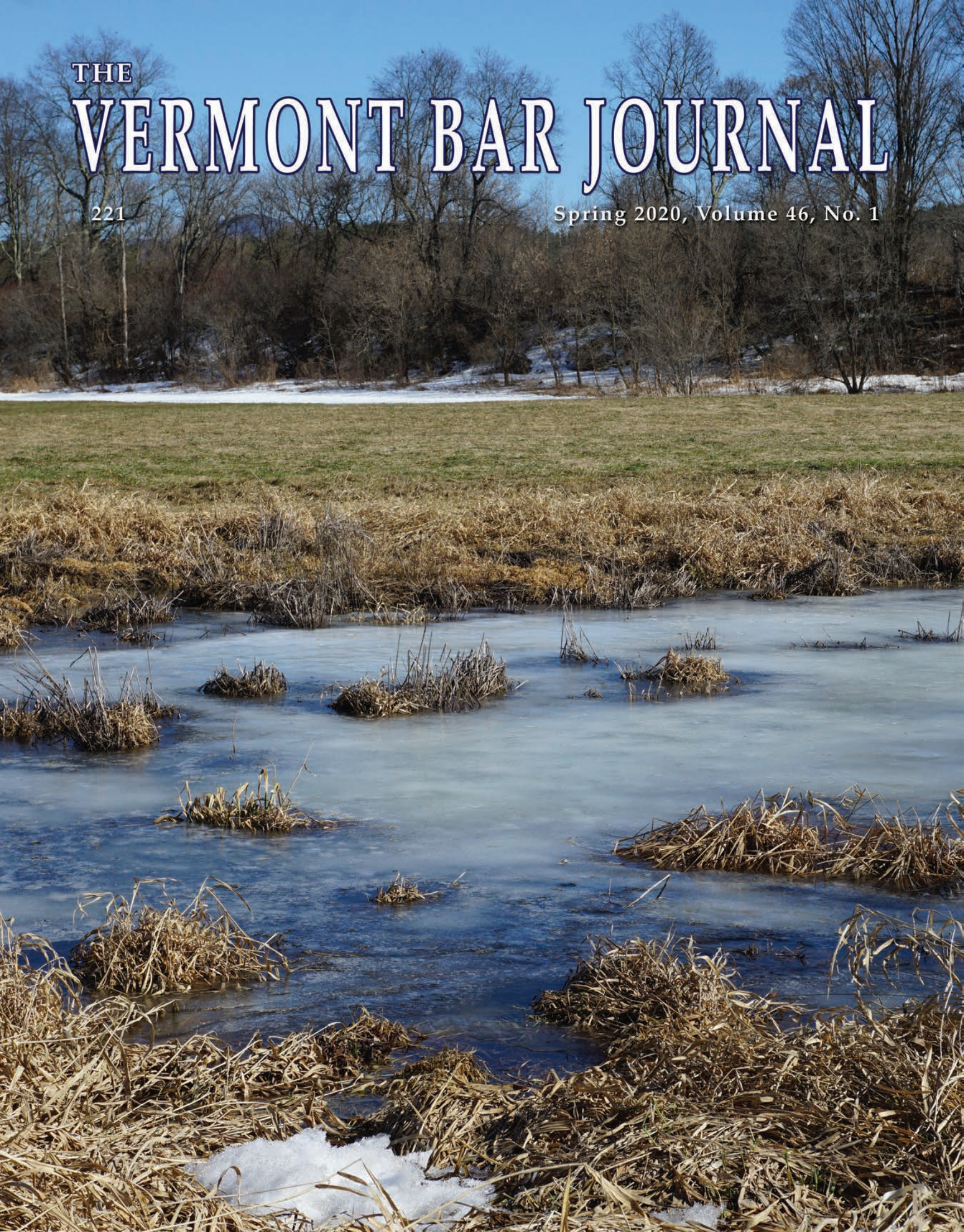


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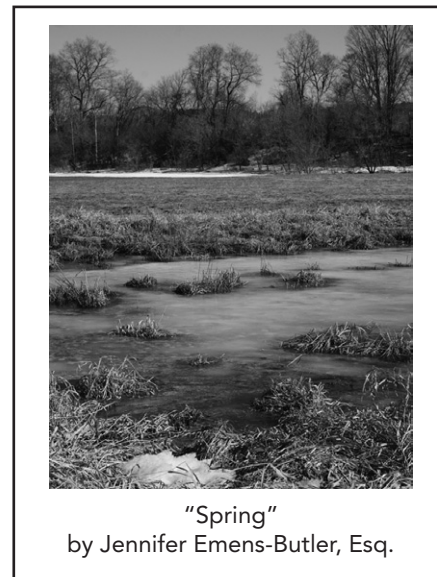
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PRESIDENT'S COLUMN

Many years ago, I received performance feedback from a supervisor. The feedback was positive so I was feeling pretty good. As I was leaving, the supervisor offered one final thought: *You might try to be more feminine.* I stopped in my tracks because he had unintentionally just delivered a gut punch. I managed to calmly ask him what he meant by that comment because I wore make-up, jewelry, dresses and heels to work and in court. He explained that some of the male lawyer/adversaries --the "shorter ones" he noted--were intimidated by me. He posited that their reaction was due to my courtroom presence, height and self-confidence. He finished by explaining that he debated whether to share this with me but in the end opted to share in the event I wanted to incorporate the feedback to become a more effective litigator. I, on the other hand, had absolutely no idea what to do with the advice because it was not really about being more feminine it was about making male adversaries feel less threatened and better about themselves. I told him that I can't change who I am and noted that this was more their issue than mine. A good intellectual answer that belied the fact the "advice" dinged my confidence, raised some self-doubt and just plain hurt.

There is a lot to unpack from that incident which sadly was not an isolated one in my 30+ year career. But for today, I simply offer it as an example of what I and other women experience in our profession. While courtroom presence, confidence, command and even well-placed emotion are often regarded as positive qualities among male trial lawyers, female trial lawyers exhibiting the same behavior receive mixed reviews. Many women and notably female lawyers are keenly aware they are subject to a different standard: damned if you do and damned if you don't. If women are too assertive they run the risk of being perceived as strident and abrasive. If women are not assertive enough they run risk of not being taken seriously or lacking command of their work.

In a recent study using juries, the authors concluded that female attorneys expressing anger during closings were regarded as "significantly less effective" while male attorneys expressing anger in closing arguments were regarded as "significantly more effective". (Salerno, J. M., Phalen, H. J., Reyes, R. N., & Schweitzer, N. J. (2018). *Closing with emotion: The differential impact of male versus female attorneys expressing anger in court.* American Psychological Association, Law and Human Behav-

ior, 42(4), 385-401).

In a recent article by Susan Blakely Smith (*How Women Lawyers Are Perceived: The Double Bind*, October 2019, Ms. JD <https://ms-jd.org/>) the author noted:

One female trial lawyer who is also a former judge and prosecutor, acknowledges the double standard and accepts the challenge. However, she also has the following advice for women lawyers in the courtroom: Wear dresses, low heeled shoes, little to no jewelry, smile a lot but don't appear to be laughing.

In September 2018, Professor Lara Bazelon wrote an article published in the Atlantic about this phenomenon entitled *What It Takes to Be a Trial Lawyer If You're Not a Man* (<https://www.theatlantic.com/magazine/archive/2018/09/female-lawyers-sexism-courtroom/565778/>). Professor Bazelon interviewed female trial lawyers who expressed the many forms of this double standard. The takeaway is that women lawyers spend a lot of time thinking about how to navigate these turbulent waters and in the end it always comes down to concocting the winning formula for how we should act or dress.

This double standard has been the subject of so many other studies and articles that I cannot dive into all of them here. Suffice to say most female lawyers I've encountered know it exists. So, the results of the recent Vermont Bar Association (VBA) and Women's Division Survey on Bias did not come as a surprise to me.

Gender bias is identified as a problem in our profession by 71 % (226) of the 343 VBA members (male and female) taking the VBA Gender Bias survey. In addition:

- 80% (177/222) of women taking the survey state that they had personally experienced gender bias in the workplace or workplace setting.
- Those experiencing bias attributed it to a supervisor (52.9 %), opposing counsel (47.5 %), client (42.1 %), co-worker (38.7 %), colleague (37.7 %), judge (29.4%), litigants (23 %), court personal (13.2 %), other counsel (10.7 %) and other (8.8 %).

What do we do with this information? We can argue it or learn from it. I suggest we all lean into the latter and be curious and open to change. We can easily research this topic by using the internet, publications and local library. We can also:



- Consult with experts to assist in improving the workplace culture particularly as it may relate to implicit bias.
- Attend the VBA's CLE series on Implicit bias in our Profession or other similar community discussions. Race is the next subject to be addressed in the VBA series on implicit bias (Mid-Year Meeting, March 27, 2020).
- Review the American Bar Association website or read the Harvard Business Review for articles and other resources on this topic.

The science behind implicit bias suggests that we are apt to act on our unconscious bias if we act in haste without taking a moment to be self-aware. We all need to take a moment and check ourselves by questioning what is really behind our reactions and judgement of colleagues.

We can also start changing our workplace culture by recognizing that not everyone in the room looks like us or shares our life experiences; by being sensitive to colleagues in the minority among the collective; by being curious about what we are feeling about a colleague and where those feelings come from; and by thinking about how to talk about bias in our workplace in a way everyone can talk about it candidly.

We are a thoughtful and caring group of people. If we all set the intention to practice self-awareness and social awareness, I know we can collectively improve our workplace culture and address bias in a way that moves our profession toward meaningful and lasting change.

The Gender Bias survey results summary is posted on the VBA website under About Us.



PURSUIITS OF HAPPINESS

Mike's Garage: An Interview with Mike Kennedy

JEB: We are here, in separate home offices because of COVID-19, and I'm interviewing you, Mike Kennedy for our Pursuits of Happiness column. So Mike, I've been wanting to do this for a very long time since you walk the talk on Pursuits of Happiness and are a real champion for this cause. Thank you for agreeing to be interviewed!

MK: Well, thank you for interviewing me.

JEB: Originally I was thinking of marathon man for our title since we are going to talk about marathons, but Mary at our office had this idea of calling it Mike's Garage, as we go through all the medals and items you have in your bar garage, a happy place!

I suppose we should start talking about running first. Normally, we talk about people's passions and often find that the interest developed when they were a child, but my understanding is you never used to run, is that right?

MK: That is absolutely correct. For the longest time I couldn't stand running. I thought it was something that just anybody could do easily and that it was no big deal. And then there came a day when that changed.

JEB: And it wasn't in high school!

MK: No, it was not in high school. I think the furthest I ever ran in high school maybe four miles. There used to be the block when we were kids where my mom would say 'go do the big block' to sort of get us out of the house and it's four miles around that block. And that was the farthest I ever ran until 2006.

JEB: Well, that's a big block though, four miles, I don't think I could run even four miles when I was in high school. Did you do other sports in high school?

MK: I played football and basketball.

JEB: Okay. So no running but you were athletic, then. And then you played basketball. And you coached in your adult life too?

MK: Right. I started coaching when I was in college and I've pretty much coached one team or another on one level or another since I was at UVM.

JEB: But again, you didn't run at UVM? Or at least 4 mile runs for fun?

MK: No, from high school until I was 39, I wouldn't even do a casual run to the mail-



box or around the big block. I couldn't, I hated it!

JEB: That's so funny. People who know you know you have a passion for running! So what changed?

MK: I remember exactly what changed. In 2006, a bunch of my friends who had always entered a relay team in the Vermont City in Burlington. That year, they asked me to be on their relay team. Two of the friends used to have this big party after the marathon and the party was awesome, but I never actually had been on one of the teams that ran. I figured well I might as well just get in the spirit of the day and be on a relay team after all. How hard could it be to run a five-mile segment on a relay team?

JEB: It doesn't seem easy to me, but I'm not a runner.

MK: I got assigned a leg that was 5.2 miles and I was still thinking it was no big deal. The race is always at the end of May. In mid or late April, I was thinking maybe I better go practice a little bit. So I went for a run. I didn't even make it a mile before I had to stop gasping out of breath and in so much pain! I panicked thinking I was never going to be able to do this.

JEB: Well, they say the first mile is the hardest, right?

MK: Yes but that that day, the first mile was the only mile! I walked home with my



tail between my legs.

JEB: But you didn't quit.

MK: I didn't quit. And then I got really lucky. I got assigned the last leg of the relay, which means you get to cross the finish line. You're cruising down the bike path in Burlington and you're passing all these people. So at the time, I literally thought I was like an Olympic champion. A few years later I realized that I was only passing people because they were doing the full marathon! Anyhow, the race ends at the Burlington waterfront. You run through this skinny chute where there are just tons of people on either side cheering and it's great, so motivating. And I became addicted! And from there I just started running more races, increasing my distances, and then eventually ran a full marathon two years later.

JEB: Wait, it was the excitement of the finish line that got you addicted to running, not the running itself?

MK: I think that's kind of true. I never thought I was going to stick with it, I just was thinking that I was just going to get through this relay. But I liked the running part, mostly being in a race, the competitive part. So, I stuck with it. Six months later I ran my first half marathon. The feeling of running through the finish at my first race definitely stuck with me and motivated me.

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JEB: Running a half marathon six months later is impressive. Did you train that whole time?

MK: Nope. I didn't have any formal training but just slowly increased my distances. I was winging it.

JEB: Ha! A long time ago my husband and a friend decided the night before the Quechee half-marathon, while drinking, that they would run the next day. Our friend had to buy shoes that morning. No preparation but they made it. I think it took them at least a week to recover though.

MK: I've had a few races like that!

JEB: That's why I was asking about whether the finish line was the best part because I think a lot of people who exercise (myself included) find that it's the adrenaline rush and the feeling afterwards just for having done it that is the best part, but very much not enjoying it the whole time!

MK: That pretty accurately describes every single marathon I've ever run!

JEB: So you don't enjoy the running?

MK: I enjoy the process of training for a

marathon, getting in shape, and the feeling of accomplishment after. The marathon itself is usually great at the start. I'm so excited for it, but there comes a point in the marathon where I'm thinking why did I sign up for another one of these? But within an hour of it ending, whether it was a good one or a bad one, I'm already online looking for the next one to do!

JEB: Because while you still have the adrenaline going, you let the adrenaline make the decision!

MK: So true. If I do poorly, it seems the quicker I am online, finding another one to do.

JEB: When and where was your first full marathon?

MK: In 2008, two years after my first run, I ran the Vermont City Marathon.

JEB: Oh-- So you got to be passed by all the last-leg relay folks this time!

MK: Exactly. Two years later, I was cursing the people who were acting like I had two years earlier!

JEB: How many marathons have you run now?

MK: I've run 21 marathons.

JEB: That's incredible in and of itself, but am I right in asking: didn't you run two full marathons in the same weekend?!

MK: Yes. It was 2016. One of my goals was to qualify for the *Marathon Maniacs*. It's a club. The easiest way to qualify is to run 2 marathons, in 2 days, in 2 different states. So, that's what I did.

JEB: How'd it go?

MK: Way better than I expected! Although, I almost quit in between the two. I'd planned so diligently. I kept telling myself, 'Mike, it's two marathons. You can't race the first one.' So what did I do? The first one was in Hartford, Connecticut, and it was just a beautiful day for running. It was like 48 degrees, no wind, no rain, some cloud cover and the course is dead flat. I went for it! Finished with my third-fastest marathon time ever. But then I was done thinking my goodness, what have you done? I was just beat.

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So I hop in the car to drive over to Albany, New York...

JEB: A long drive from Hartford to Albany is not something that is recommended after running 26 miles?!

MK: Correct. Not good to take a long drive after a marathon--I could barely unfold myself out of the car. I was so beat and discouraged. The whole drive I was thinking I'd go to Albany, instead of back to Vermont, only because I had a hotel room and I wanted to pick up the race shirt. But I figured I'd get there and decide not to run in the morning. I remember I got to my hotel room and I didn't even have the normal carb load pre-run. I grabbed a pint of Ben and Jerry's and a couple of beers.

JEB: That was your healthy dinner choice before a marathon?

MK: Yes. I was just so frustrated, and I just didn't even care at that point. But the next day I woke up early and felt pretty good. And I thought of all the people I'd told about my plans, felt accountable, so I ran. And it went surprisingly well.

JEB: Must've been the Ben and Jerry's!

MK: I guess so! To this day, I can't explain it. The lesson I drew from it was maybe sometimes you ought to just show up for a race and run it for fun instead of getting so caught up in the competitive aspect. And you might actually do better!

JEB: Well, that's true. So many sports require you to let your mind go. What is your favorite marathon?

MK: Well I've run Burlington many times, so I have a soft spot for my hometown race. The crowd support is crazy good. As a marathoner who qualified for Boston, I'm probably "supposed" to say Boston. Not my favorite: the logistics or the course. I ran a marathon in 2016 in Huntington Beach, California. It was stunning. The last seven or eight miles of the course are on a bike path that's immediately adjacent to the beach and the Pacific Ocean. So the palm trees, beach, ocean—they all kind of take your mind off the mental and physical duress you're under for the last six miles. And I just loved it. That was my favorite course.

JEB: I was wondering if you could let your mind wander and enjoy the scenery during any of the runs. So was that beautiful spot your fastest race?

MK: The fastest marathon I've ever run was actually in Burlington. It was 2012 and was the first time I qualified for Boston.

JEB: I was going to ask about Boston and whether you were there for the bombings.

MK: Yes. 2013. My first Boston and that was the year that the bombs went off.

JEB: You weren't near that finish line at the time, were you?

MK: I was. Going to Boston, I didn't know if I'd ever qualify again. So, based on advice from others who'd run Boston, and not knowing if I'd ever make it back, I decided to make the most of the experience. That included staying a hotel near the finish line. I couldn't see the actual finish line from my hotel room, but I could see a spot about 50 yards beyond it.

The day is so strange for me to think about. My dad was going to meet me there that year, but he got sick, so he didn't come. I remember afterwards thinking how lucky we were because the logical place to meet up with someone after the race would have been at the finish line.

After I finished, I was actually going to walk back to the finish line. But the sidewalks and streets were so crowded, that I went to my hotel room. I called my dad. While I was talking to him on the phone, I became aware of the sirens. At first I was thinking, well, it's a big city, no big deal. But then it seemed crazy, why are there so many sirens? So I looked out the window. The Boston Public Library was right next to my hotel and the marathon's medical tent was set up in the plaza in front of it. I immediately knew that something had happened. There were ambulances and police cars everywhere, with people running. This was not the typical post-marathon medical tent full of people who had cramps or who were dehydrated, something bad had happened. I hung up with my dad. I remember checking Facebook. I'd posted my time. A friend had commented 'great job, now get the hell out of Boston.' So I turned on the TV. Initially there were reports that there had been a fire in a kitchen of a hotel near the finish line. Then they reported about the bombs.

JEB: That must have been so scary. And it immediately turned into a manhunt.

MK: Yes. Well, one of the reports was that they were pretty sure there were more bombs in hotels near the finish line. Jen, I panicked. I don't deny it. I didn't know what to do; I just didn't want to be in a hotel that blew up. So I grabbed my bag, stuffed everything into it, and I took off. I hadn't even changed yet. I'll never forget. I was on the 33rd floor but I went down the stairs, too chicken to be on the elevator, because all I could think of was 9-11. I got to the street and it was just pure pandemonium and chaos with people running everywhere. I ran too. I'd left my car in Lebanon, NH and taken the bus to South Station. So I ran to South Station and hoped my bus would get out. Right before the bus was to board, I remember these soldiers came, with assault weapons and full tactical gear with bomb sniffing dogs. And I thought for

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sure there's no way we're leaving. But we did. And that was the first time I ran Boston.

JEB: That is an incredible story. Did you go back the next year?

MK: Yes. I re-qualified. I didn't have a good training cycle the next year didn't want to run, but I felt like I had to go back because I owed it, not to get sappy on everybody, but I felt like I owed it to all the victim.

JEB: Not let the fear control us, but also to pay tribute and make it a special day.

MK: Right. That was exactly my thinking. My brother went to support me. I didn't have it that day. About mile 15, I thought I was going to be sick. I walked into a medical tent and asked for Tums or something and I almost quit. But the nurse said something like don't give up. And I said, well, will you just call my brother and tell him I'm going to be a lot later than I thought? And she called my brother, which was just so amazing to me. I kept going and finished. When I found a spot to sit down, I sat down and cried. All I remember is that my brother was there-- he had no reason to be there other than to support me. The fact that he was always makes me think that sometimes doing nothing other than just being there is a great way to help people.

JEB: Absolutely. And it turns out you did need it. What a moment to share. I don't know which story is more incredible.

You must have tons of great stories from all your races. So you have the 21 marathons but they're not in 21 States. Is one of your goals not the 50-state club?

MK: It is! But the funny thing is you gain admission to the club once you get to your tenth state. I've done 8, I just have two more then I can say I'm in the club. You know, paltering, like I did the pond trail with Jennifer Emens-Butler!

JEB: That's too funny. I mean it is implied when you say you are in the club. Not paltering but do you have the actual 50-state goal in mind?

MK: I used to, but marathons for me are just too hard. I sort of switched it up last year and moved to half-marathons.

JEB: Well you made a Vermont club right of your own. Did you finish the County club?

MK: Oh, that's right. I forgot about that. Two years ago, I made it my goal to run at least one 10-mile run in every County in Vermont. Yup, did it. A friend is trying to run at least a mile in every town in Vermont and there's what, 251 of those? I only had to do 14.

JEB: Yes, but that's still 140 miles minimum. I'm impressed! It's still a lot more than I could run, that's for sure. Now do you run after work or before work just for fun?

MK: I prefer before, but I don't always make it out of bed on time.

JEB: And I'm sure you find that clears your head as with most exercise?

MK: Yes. It's great to have that outlet and Vermont is beautiful for running, with enough space even during this Pandemic.

JEB: And it's something that you can still compete in, which is great. For many sports, people are called washed up at 35, but you can always run.

MK: Yes. No way I can play competitive basketball anymore. But I've been really lucky that I've never had any hip trouble or back trouble. And you know, my dad's 82 and he's doing 5K's and my mom still runs.

JEB: I'm so happy I've had a chance to interview you for this column. I know you're a fan because you blog about it but also it seems like running is a great way to clear your head and practice wellness. You certainly work hard to promote well-being among lawyers and work to highlight the good things that we are all doing. So thank you for being an inspiration to me.

MK: And thank you. I think your column is awesome. I don't know if you found this with your column but I found with wellness Wednesday that there are a lot more lawyers than I expected who actually are out doing pursuits of happiness and doing things that are unrelated to the law to help their wellness. Maybe before wellness became such a big issue, we didn't want to share what we were doing, feeling like we had to instead be tough and show how we work all the time and on the weekends. I've just been pleasantly surprised at how many lawyers are in a band or in a pickup hockey league or are artists, having a hobby that has nothing to do with the practice of law. So in a way, one of the benefits of the wellness movement has been to destigmatize fun. God forbid we have fun!

JEB: I couldn't have said it better. I also think being in Vermont, you know--you get the scenery bonus but you can't eat it--people live here for a reason. There are a lot of people who just enjoy what Vermont has to offer and just be outside. Even in the winter--I know I can't get you to love cross country skiing, but maybe you will someday.

MK: Someday maybe.

JEB: I know one of your other law-related passions is educating lawyers on how to

deal with their own stress and ethical dilemmas. But you make it fun. Last week when everybody thought the world was ending and we were all trying to figure out what to do with ourselves, you made educational videos in your bar garage and I've heard many people say great things about them. Are you going to keep it up?

MK: You are too kind. If you say many, I don't know how many people actually watch them.

JEB: I have heard from many people, many is more than four, right? But what a positive thing you did. **MK:** And it was more for my own wellness, honestly. There is so much uncertainty around. I thought maybe this was a chance to take my mind off stuff for a little bit. Not get dressed up and be all serious about it, but just hang out here in my garage bar and talk about the one thing I know, which is legal ethics. So that's what I did.

JEB: Well a garage bar is a pretty cool place to learn and also unwind! And it's decorated with all your medals.

MK: Yes! Most of which are participation medals -- everyone gets one for showing up! I didn't win all of them. But the garage, yeah, it's like a sports bar theme based on my coaching & running.

JEB: Well you did more than show up -- you actually ran those races! Sounds like a peaceful place. And even though we're alone it is always great to see other people, even via ethics videos in a garage bar! Well, I definitely appreciate you taking the time to tell everybody your stories, complete with so many lessons. Like it's never too late to start something. Or how important it is to have a passion that takes your mind off of work. Or how fun it is to see what other lawyers are doing in their spare time. Even ethics lessons!

MK: Yes, the garage bar is always open, well I guess not to others right now. But anybody who's a member has a standing invitation to stop by the garage bar, hang out and pursue happiness with me when this crisis is over!

JEB: I will certainly take you up on the invitation. Thank you!

Do you want to nominate yourself or a fellow VBA member to be interviewed for Pursuits of Happiness? Email me at jeb@vtbar.org.





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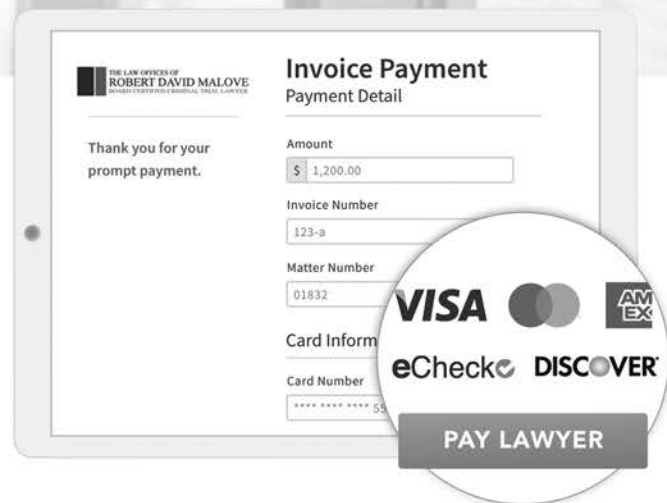
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RUMINATIONS

Impeachment in Vermont

Now that the impeachment trial in Washington has ended, unless you are entirely exhausted, perhaps a look back at how Vermont has applied the sanction would be interesting. As with the federal Constitution, in Vermont it's a two-step process that begs many questions of process and definition. The House of Representatives, by a two-thirds vote of its members, may vote to impeach a state officer, whether judicial or executive (but not legislative). The Senate then holds a trial and decides whether to remove the official. That vote must also be effective upon a vote of two-thirds of the members present.¹ The offense that triggers impeachment is maladministration. "Treason, Bribery, or other High crimes and misdemeanors" are the standards for impeachment from the U.S. Constitution, but maladministration is the sole basis for impeachment and removal in Vermont.²

The Law of Impeachment

The 1777 Vermont Constitution gave impeachment powers to two bodies, the Council of Censors and the General Assembly, and the removal power to the Governor and Council. The Council of Censors had the power to impeach any state officer. The General Assembly's impeachment powers were limited to county officers, including justices of the peace, sheriffs, and county judges. In either case, if impeachment was voted by a simple majority of the body, the Governor and Council would then hear the case and determine whether to remove the individual from his office.³ When the Constitution was first amended, in 1786, the Assembly's impeachment powers were deleted, leaving the Council of Censors as the sole and exclusive body with the power to impeach and the Governor and Council to try it until 1836, when the Governor and Council was abolished and the Senate was given the power to try and decide on all impeachments. The Council of Censors retained the authority to impeach officials. The 1836 amendment added that impeachment "shall not extend farther than to removal from office—and disqualification to hold or enjoying any office of honor, or profit, or trust, under this State. But the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment, according to law." In 1870, the Council of Censors



Matthew Lyon



Malcolm "Mike" Mayo

was abolished, its former impeachment authority transferred to the House of Representatives. The Senate's role conducting the trial remained intact.⁴

The Supreme Court was also involved in the process, at least until 1836. The Constitution required the court to advise the Governor and Council during the trial of a state officer if the Assembly needed its help. After 1786, the Governor and Council could award costs, in addition to removing the accused from office. After 1836, the judiciary had no direct role.

Based on how it was used, the term "maladministration" meant anything the Council of Censors or the General Assembly thought applied, from collecting too much in fees to insubordination.⁵

There are only a handful of reported cases of the Vermont Supreme Court that discuss the impeachment power. One involves John Campbell, a Justice of the Peace indicted for a misdemeanor in 1802 for renewing a writ of execution after his commission expired, and taking fees for it. Campbell, after completing one year as JP (and not being elected for another term) endorsed a judgment to renew the writ and dated it one month earlier than he signed it, to cover himself. The Supreme Court considered whether he could be criminally indicted for maladministration and concluded that the only way was by impeachment. The Court explained, "In cases of mal-administration there is a peculiar and manifest propriety in . . . bringing State criminals, as they are styled in the Constitution, to trial, before this high national tri-

bunal, where the solemnity and publicity of the trial will either publicly purge their official characters from imputed crime, or make their mal-administration known to the citizens at large, and especially to those in whom rests commonly the election to office."⁶ Impeachment after his term was up, however, was futile.

In 1987, the Vermont Supreme Court found that impeachment and removal under the Constitution would not impair its own role in judicial discipline, in the matter of Assistant Judge Althea Kroger.⁷ The proceedings against Justice William Hill in 1989 again raised the issue of whether the suspension authority of the Court interferes with the legislative power of impeachment and removal, and the high court rejected the claim. As Hill had retired by the time the Court suspended him from further judicial duties, impeachment would not accomplish anything.⁸

In 2009, the Supreme Court found a Windsor County Assistant Judge had violated the Code of Judicial Conduct by failing to recuse himself from participating as a director of a nonprofit corporation in its land dealings with the county court and by failing to maintain the dignity and integrity of his office during a reelection campaign. This latter charge involved writing a letter to a local paper charging his opponent with stealing a campaign sign and accusing the opponent of "nastiness." The judge was suspended from his duties both judicial and administrative for six months. The court rejected the claim that its jurisdiction was limited to a judicial sanction and

that impeachment was the mechanism for disciplinary action relating to administrative matters. The General Assembly's powers were held to be supplementary to the Court's authority to discipline judges.⁹

Expulsions from the Assembly

The General Assembly has always had the power to expel a member. At times this process has used the word "impeachment," but this is not a true impeachment power, but rather an outgrowth of the power to judge the qualifications of members which any formal body enjoys inherently and that Vermont's legislative branch has as a constitutional duty.¹⁰ Originally this power to expel was qualified by prohibiting expulsion "a second time for the same reason." Then in 1786 the Constitution was changed to read that members may be expelled for any reason but "not for causes known to their constituents antecedent to their election," words that remain the standard today.¹¹

In June 28, 1781, two members of the House were "impeached." Daniel Martin, a representative from Putney, had sold discounted Vermont bills of credit to another representative, John Abbott of Hoosick (at that time a part of Vermont), for hard currency at one-fourth their face value. Vermont was facing a fiscal crisis in the midst of the war. Money was scarce, so Vermont's General Assembly had authorized the issuance of bills of credit as a substitute. The devaluation of these bills of credit represented a serious assault on the integrity of the state. That two of the state's representatives were engaged in selling discounted bills was an embarrassment. The House voted to expel Martin and publicly reprimand Abbott. Martin promptly made "a public recantation for the crime for which he was expelled, and evidenced signs of sorrow and Repentance," whereupon the House resolved to restore him to his seat that afternoon!¹²

Jonathan Fasset of Pittsford was the next to be "impeached." On February 19, 1787, the legislature ordered him suspended until a petition was brought for the offense of aiding and assisting the mob which assembled at Rutland in November of 1786 to stop the County Court from sitting. After hearing the evidence, the General Assembly ordered him suspended from his seat in the legislature and he was expelled by unanimous vote. Fasset was also ordered to pay the expenses of Darius Chipman, State's Attorney for Rutland County, who had prosecuted him.¹³

There have been other expulsions over the years, a failure to qualify for office, but misconduct has been handled privately and the member allowed to resign.

Impeachment in Practice

The first Vermonter to be accused of an impeachable offense was Matthew Lyon, in 1779 when he was representative from Arlington. Dr. Reuben Jones, the representative from Rockingham, had some beef with Lyon, and advanced an impeachment petition against him. The petition didn't survive, so we cannot know the accusation, but the General Assembly promptly resolved that Lyon was *not* impeached and that it would "not act any more on the paper signed Reuben Jones (called an impeachment) against Mr. Lyon at present."¹⁴ This was not the last Matthew Lyon would confront impeachment, however.

The first true impeachment in Vermont history came in 1785. John Barrett was a Justice of the Peace for Windsor County who in 1781 had issued writs and given judgment and execution against several men, who brought their complaint to the General Assembly. The prosecutor, Stephen Row Bradley, accused Barrett of issuing a judgment in one case when he knew the parties had settled it and in another when he knew the defendant had been dead for three years. Barrett had "excited and encouraged many needless & vexatious Law suits to enhance bills of Costs to the oppression of the People."¹⁵ His accusers wanted the judgments overturned and their costs paid. Unlike the quick work in the impeachment of Daniel Martin, however, this process dragged on.

The General Assembly resolved to impeach Justice Barrett in October of 1783, appointing Bradley to the job of prosecuting him.¹⁶ Barrett continued in office after this time, while the trial before the Governor and Council was pending. The following March, the Assembly resolved that its actions the previous fall had "virtually suspended" Barrett.¹⁷ But Barrett had never been officially notified of the actions of the Assembly, and a committee of the General Assembly, doubting the validity of the actions taken the previous October, encouraged the petitioners to find their remedy in the courts of common law.¹⁸

In October of 1784, the Assembly appointed Samuel Knight to prosecute Barrett. The following June the Governor and Council held a trial. Barrett pled not guilty, but after considering the evidence the Governor and Council finally suspended him from his office for six months and ordered him to pay the costs of prosecution, which amounted to more than ten pounds.¹⁹ Barrett requested a new trial, but the Governor and Council concluded it had no authority to allow one without an order from the legislature. The General Assembly quickly voted to allow a new hearing at the next session of the Assembly.²⁰ Finally, in October of 1785, following the second



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trial, the Governor and Council found John Barrett guilty of maladministration and suspended him from office for six months, again ordering him to pay the cost of prosecution.²¹ These costs included money for prosecutors Bradley and Knight, and various witnesses. The process had taken four years.

Justices served one-year terms in those early years. That Barrett could be impeached and removed from office in 1785 for offenses committed in 1781 did not appear to distract the Assembly or the Governor and Council.

Next up was Matthew Lyon. The same month Barrett was removed, on October 15, 1785 the Vermont Council of Censors voted to impeach Lyon for refusing to deliver the records of the Court of Confiscation to the State. Three days later he was tried by the Governor and Council and fined 500 pounds if he neglected to perform.²² He was also reprimanded by the Governor and Council for his refusal and ordered to pay the cost of prosecution. Lyon asked for a new trial and the Governor and Council agreed, but following that hearing the decision was affirmed. No record from that time shows that Lyon either returned the records or paid the fine, but Lyon was required to pay more than two pounds in costs.²³ John Fasset, who had served as commissioner of sequestration and sales, was also asked for the records. Fasset at first refused, and then, faced with a lawsuit from the state auditors, handed them over.²⁴ The records became part of the manuscript state papers and were published in 1941.²⁵

Lyon had good reason to withhold these records, as they revealed his purchase of several properties seized by Vermont from Tory landowners, during the time he was clerk of the Court of Confiscation in 1778 and 1780. Lyon's biographer Aleine Austin says the records do not show he was guilty of corruption, but rather "that he was insensitive to the notion of conflict of interest (more developed today than in his time, to be sure), and that he used his official position and inside knowledge to acquire some choice property for future speculative gain."²⁶

Abner Osgood, a Justice of the Peace for Orange County, was accused of an impeachable offense by Dr. Nathaniel Gott in October of 1785. Osgood, according to Gott, had found Osgood collected amounts larger than the law allowed for Justice courts, among other matters. Osgood was summoned to the Assembly, but never appeared, and the petition was likely dismissed without action.²⁷

Matthew Lyon makes another appearance in the history of impeachment in Vermont in 1792. On October 11, 1792, he petitioned to have Lemuel Chipman, Assis-

tant Judge of Rutland County, impeached for maladministration for signing an attachment against Lyon without first giving an oath as the law directs.²⁸ No action came of it. The oath required the creditor to swear that he was in danger of losing his debt without the attachment. It is hard not to see the petition as retaliatory. Nathaniel Chipman had been counsel to the Council of Censors in 1785, when Lyon was impeached, and Lemuel was his brother.

William Coley was high sheriff of Bennington County in October of 1799 when he was impeached by the Council of Censors for taking greater fees for summoning the grand and petit juries than the law allowed. The official charge was maladministration. Coley had charged \$38.27, and explained he had to go to several of the towns more than once to find enough jurors. Of that, \$25.74 was for travel. A committee of the legislature found the charges wholly unsupported, and urged their dismissal. The case never made it to the Governor and Council. The Censors objected to this as unconstitutional meddling, saying in its report that the Assembly had no independent authority to inquire, and that the legislative committee did not have all the materials in front of it when it conducted its inquiry.²⁹

Two sheriffs were the subject of an impeachment inquiry by the Council of Censors in 1799. John Chipman, sheriff of Addison County, and Prince B. Hall of Franklin County were each accused of taking more fees than the law allowed. A committee looked into the evidence and then discovered that the fees had been approved by the Supreme Court, which ended all further discussion of the conduct.³⁰

In 1806, David Leavitt, a Windham Justice of the Peace, was summoned to the Council of Censors, then meeting in Woodstock. Rather than appearing, he sent a letter pleading guilty to the accusations. The Council of Censors then concluded that his conduct was "highly reprehensible and deserving of public censure."³¹ What he did is not clear from the record. A public censure ended with the Censors, and no formal trial was held before the Governor and Council.

The Mayo Impeachment

One hundred and seventy years later, Malcolm (Mike) Mayo, Sheriff of Washington County, was impeached by the House, tried by the Senate and acquitted. The three charges included falsifying documents relating to a drug raid, ordering his deputies not to cooperate with other police agencies, and participating in bar fights.

Attorney General M. Jerome Diamond triggered the impeachment with allegations of wrongdoing. The House Judiciary

Committee opened an inquiry, and on January 15, 1976 the House voted to give the committee subpoena powers. The committee held closed door sessions to hear testimony from witnesses, who included police officers and a man who was assaulted by the sheriff at a Montpelier tavern.

During the course of the House Judiciary Committee's work, its counsel William Russell recommended that "maladministration" be defined as actions that "invoke moral turpitude and willful corruption." He advised that the committee should focus on serious charges and "problems as they relate to the holder of the public office, not just the character of the man."

Mayo was represented by Richard E. Davis. John Meaker served as prosecutor. Their styles were notably different. A reporter described Davis guiding "Mayo's defense with bravura, alternately cajoling witnesses with sweet smiles and browbeating them in a deep, grating voice." This "theatrical style" contrasted with Meaker's "quiet consistent manner," that was "marked by his monotone delivery."³²

On March 11, the House voted to impeach Mayo on all three counts. The first charged him with using an unauthorized person in a drug raid and then falsifying the records to show he was a deputy at the time of the raid; ordering a deputy to falsify the records of that raid, falsely alleging in a report that marijuana had been seized in the raid; and in a separate incident falsifying a statement to the Montpelier police about the barroom fight. The second count alleged failure to perform the functions of the office of sheriff and focused on Mayo's order to his deputies not to cooperate with any other law enforcement agency, make patrols, initiate criminal cases, or issue traffic citations. The third addressed breach of duty, related to the assault at the bar, "unjustly and without provocation," abusing and threatening citizens and a police officer and hindering efforts to restore peace during an incident at a Stowe night club, and ordering a deputy to abandon his post at the Waterbury bar "in retaliation for complaints made of the sheriff's personal conduct," involving comments made to a woman at a bar "identified as a deaf mute."³³

Mayo had pled nolo contendere to a charge of simple assault in District Court and was fined \$150.00 for the incident at the Thrush Tavern.

The charges were delivered to the Senate by the House managers. In preparation, the Senate adopted procedures that would be followed.³⁴ The hearing on impeachment was then set for the end of the session. Mayo was served with a subpoena by the Sergeant-at-Arms and the Senate began the impeachment trial on May 17, 1976. Mayo's attorneys moved to dismiss

the charges, arguing that impeachment does not apply to sheriffs, as the Constitution refers to officers of state. Rep. Meaker answered that the legislature had pursued impeachment against county officials in the past. The Senate voted 22-4 to reject the defense, concluding that a sheriff was a state officer.³⁵

Earle Kelly, a former Northfield deputy sheriff, was subpoenaed. He had left Vermont before being served and was the subject of an order by an Illinois judge to take him into custody and return him to Vermont. Kelly returned on his own for the trial. Kelly and his wife Paige, both deputies, had left Vermont in April after learning they were to be subpoenaed by the defense, and Earle Kelly had enlisted in the Navy.³⁶

Rep. David Drew introduced the House case against Mayo, alleging that Mayo's actions "strike at the very heart of our precious freedom." Drew later resigned after the Senate ruled against his proposal that one vote be taken on the three articles of impeachment. "I'm not participating in these proceedings any further," he said.³⁷

Meaker was frustrated that evidence of Mayo's statements about the incident at the Thrush Tavern were not admitted into evidence because the statement was not made by Mayo in his capacity as sheriff but as a private citizen. Davis was frustrated at being denied free challenges to previous testimony and court inquests. He called former deputies James Jollota and Earle and Paige Kelly to testify. Earle Kelly said Mayo predated commissioning papers to cover Kelly's role in the drug raid. David McManis, another deputy, said some of the young people there had marijuana, although another deputy told how Mayo had given him a bag and ordered it be logged as taken at the raid.

Mayo testified at the impeachment trial. He admitted that his May 28, 1975 memo ordering his deputies not to cooperate with other police agencies and to cease routine duties was a mistake, corrected by an order rescinding the direction on June 2. Other deputies testified they were unaware the order had been rescinded. David Evans told the Senate the order was still in effect as late as November 5. Evans said he had been relieved of duty at that time when he had aided a state trooper returning a child involved in a child abuse matter to his father.³⁸

By a vote of 20-8, the Senate acquitted Mayo of the first charge, that he had falsified official records.³⁹

Meaker, in his final arguments on the second charge, asked Senators to answer "how low we should let [the standard for Vermont law enforcement] be dragged before we finally say it was maladministration." For the defense, Davis called Mayo's actions "an error in judgment," question-

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ing how the second count was justified as maladministration when there was no evidence that Mayo actually refused to aid other departments. No duty of his office had been breached, said Davis. The Senate voted 20 to 8 to dismiss the second charge on his failure to perform the functions of his office.⁴⁰

Former Superior Judge Donald J. O'Brien led the prosecution on the third charge, relating to the barroom incidents and charged as a breach of duty as a peace officer. O'Brien challenged the idea that Mayo was able to act as a private citizen while serving as sheriff. Co-counsel Oreste Valsangiacomo, Jr. for the defense claimed Mayo was not acting in his official capacity when he slugged a man who he believed was critical of his department, and warned that a vote to convict would be a "blot, a cloud" over Mayo and his family "for generations to come." O'Brien responded that the case wasn't about the effect of impeachment on Mayo, but "whether there has been a lessening of respect for law enforcement." The Senate acquitted Mayo of the third count on June 2, 1976. The vote was 18 to 12 in favor of conviction, but less than the necessary two-thirds required by the Constitution.⁴¹

Mayo served out his term as sheriff and was defeated in a bid for a second four years in 1978. He resigned shortly after the election to take a patrolman's job with the Gillette, Wyoming police department.⁴²

Mayo later took his claim for attorney's fees to the courts, but was not allowed to collect from the state. The Supreme Court explained that the statute allowing state and county officers their legal fees did not extend to an impeachment proceeding as it was not an "action or suit."⁴³

Leroy Null and Althea Kroger

Leroy Null was State's Attorney of Orleans County in 1980 when the House was requested to impeach him. Null had been indicted by a grand jury for perjury, destroying official records, and urging another person to commit perjury, actions taken when he was a deputy sheriff. Distracted by a pending supplemental appropriation bill, the resolution petition was tabled and in February ordered to be withdrawn. In April a new resolution was introduced, and adopted on April 7, but five days later Null died, and no further action was taken on the matter.⁴⁴

In 1996, the dispute between Assistant Judges in Chittenden County spilled over into public with the Judicial Conduct Board, which requested the impeachment of Althea Kroger. The House resolved to investigate the allegation that she had perjured herself and made false allegations of wrongdoing against Assistant Judge Eliza-

beth Gretkowski. Hearings were held, but the House took no formal action. The Vermont Supreme Court heard the accusations, and in 1997 concluded that she had violated the Code of Judicial Conduct by her false statement while testifying under oath at hearings before the Vermont Association of County Judges and suspended her from acting as a judge for one year. Kroger resigned at the end of that year. The following year the Supreme Court publicly reprimanded Kroger for "conduct which undermined public confidence in the integrity of the judiciary and brought the office of assistant judge into disrespect."⁴⁵

Final Tally

The General Assembly impeached John Barrett in 1785, and the Governor and Council found him guilty of maladministration and removed him. The Council of Censors impeached Matthew Lyon in 1785, and he too was found guilty by the Governor and Council, but not removed from office, his sanction being a fine and an order to return official records. The Censors impeached William Coley in 1799, but the General Assembly, acting beyond its authority, found the charges invalid, and no trial was held before the Governor and Council. The House of Representatives voted to impeach Malcolm Mayo in 1976, but the Senate acquitted him. Neither the Null nor the Kroger matters reached the impeachment stage. Final tally: four officials impeached, one removed, one sanctioned.

The impeachment and removal of an elective official is not a judicial act. It is not a criminal prosecution. It is a political process. The Senate acts like judges, not as a jury. The result is not a written opinion, but a report of how Senators voted. There is no appeal to the courts.

Impeachment should be used for the worst behavior of a public figure, but Vermont's most harmful public offenders walked. Henry M. Bates was not impeached. As State Treasurer he was responsible for the defalcation of \$48,428.76 of state money, but the crime was only discovered after he left office and died.⁴⁶ Horace Graham wasn't impeached either. He embezzled thousands of dollars of state funds while he was Auditor of Accounts (1902-1917), but he was indicted only after he left the Governor's office in 1920, found guilty in criminal court, sentenced to a term in state prison, and pardoned by the succeeding governor.⁴⁷ What they did was unsanctioned maladministration. Lyon's withholding records, Barrett's barratry and extra-jurisdictional judgments as a Justice of the Peace, are the sole examples of precedent for maladministration in the state's history. Colley's \$34.27 in improper fees and Mayo's bar fights, falsified re-

ords, and orders not to cooperate with other law enforcement agencies were triggers for impeachment, but not for removal. From these facts, the next impeachment will need to find its own way through the labyrinth, as happened in 1976.

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¹ Vermont Constitution, Ch. 2, Secs. 57 and 58.

² U.S. Constitution, Art. I, Secs. 2, 3 and Art. II, Secs. 2 and 4.

³ Vermont Constitution (1777), Ch. 2, Sec. XX.

⁴ Vermont Constitution (1786), Ch. 2, Sec. XXI; Articles of Amendment (1836), Arts. 7 and 8; Articles of Amendment (1870), Art. 25, Sec. 3. See P. Gillies & D. Gregory Sanford, *Records of the Council of Censors of the State of Vermont* (Montpelier, Vt.: Secretary of State, 1991), 13, 52, 368, 761.

⁵ Vermont's original Bill of Rights (1777) included Article VII: "That those who are employed in the legislative and executive business of the State, may be restrained from oppression, the people have a right, at such periods as they may think proper, to reduce their public officers to a private station, and to supply the vacancies, by certain and regular elections." The language came straight from the 1776 Pennsylvania Constitution. It is a revolutionary idea. In 1786, the line was qualified by explaining that the right to reduce officers to a private station would be exercised by "their legal representatives." This was in reaction to a growing restlessness among the inhabitants of Vermont at the time the Council of Censors met to propose amendments to the Constitution, manifested by the appearance of angry mobs at the opening of certain courts and even the legislature when it met in Rutland in 1786. The whole section was deleted in 1793, although the more specific language on how impeachments were to be conducted remained in the Constitution. *Records of the Council of Censors*, 6, 86, 138.

⁶ *State v. Campbell*, 2 Tyl. 177, 181 (1802).

⁷ *In re Kroger*, 148 Vt. 632, 632-633, 533 A.2d 1194 (1987).

⁸ *In re Hill*, 152 Vt. 576, 578, 569 A.2d 446 (1989).

⁹ *In re Boardman*, 186 Vt. 176, 192-193, 979 A.2d 1010, 1021 (2009).

¹⁰ Vermont Constitution, Chapter II, Secs. 14, 19.

¹¹ *Records of the Council of Censors*, 9, 90. Vermont Constitution, Chapter I, Section 14.

¹² Walter H. Crockett, ed., *Journals and Proceedings of the General Assembly of the State of Vermont, 1778-1781, State Papers of Vermont III:II* (Bellows Falls, Vt.: P.H. Gobie Press, Inc., 1924), 268-269.

¹³ E.P. Walton, *Records of the Governor and Council of the State of Vermont* (Montpelier, Vt.: Steam Press of J. & J.M. Poland, 1875), III: 369-370; Walter H. Crockett, ed., *Journals and Proceedings of the General Assembly of the State of Vermont 1784-1787, State Papers of Vermont III:III* (Bellows Falls, Vt.: The Wyndham Press,

1928), 271-272.

¹⁴ *Journals and Proceedings of the General Assembly 1778-1791*, 83.

¹⁵ *Records of the Governor and Council* 69.

¹⁶ *Journals and Proceedings of the General Assembly 1781-1783*, III State Papers of Vermont (II), 199.

¹⁷ *Journals and Proceedings of the General Assembly 1784-1787*, 32.

¹⁸ *Ibid.*, 91.

¹⁹ *Records of the Governor and Council* 71.

²⁰ *Journals and Proceedings of the General Assembly 1784-1787*, 148.

²¹ *Records of the Governor and Council* 90.

²² *Records of the Governor and Council* 82-83; *Records of the Council of Censors*, 30.

²³ *Records of the Governor and Council*, 93.

²⁴ *Records of the Council of Censors*, 62.

²⁵ Mary Greene Nye, ed., *Sequestration, Confiscation and Sale of Estates*, VI State Papers of Vermont (Montpelier, Vt.: Secretary of State, 1941).

²⁶ Aleine Austin, *Matthew Lyon: "New Man" of the Democratic Revolution, 1749-1822* (University Park: Pennsylvania State University Press, 1981), 23-24.

²⁷ Edward A. Hoyt, ed., *General Petitions 1778-1787*, VIII *State Papers of Vermont* (Montpelier, Vt.: Secretary of State, 150-52, 169; Crockett III (III), 206.

²⁸ *Records of the Council of Censors*, 105-6.

²⁹ *Ibid.*, 159-69. The Council was also upset about the court martial of David Whitney in 1799. Whitney was Major General of the third division of the militia of Vermont, who had been punished by court martial for unmilitary conduct. His is the only case even remotely involving sexual misconduct. Whitney had debauched the wife of his friend, and publicly assaulted his own wife. He had hit an elderly Revolutionary War veteran and refused to make restitution. Curiously, Whitney was also found to have "allowed himself to be led several miles through the streets of Addison while tied to a pole between two horses, with a rope around his neck." This last act hardly seems to include any voluntariness on his part, but it all added up to unmilitary conduct. Whitney had been count-martialed in 1799 for these crimes. These acts, in the mind of the Council of Censors, were nonmilitary offenses and not "crimes or misdemeanors." In its opinion the governor, as commander in chief, and the members of the court martial, had violated the Vermont Constitution and so themselves were deserving of censure. *Ibid.*, 168-69.

³⁰ *Ibid.*, 173. John Chipman was not related to Nathaniel or Lemuel.

³¹ *Ibid.*, 185.

³² John W. Reid, "Style of Impeachment Trial Lawyers Differs Greatly," *Rutland Daily Herald*, 24 May 1976, 1.

³³ *Journal of the Senate of the State of Vermont, Adjourned Session 1976, Adjourned Session, 1976*, March 11, 1976 (Burlington, Vt.: Queen City Printers, 1976), 245-246; Stephen C. Terry, "House Impeachment Probe of Mayo Outlined," *Rutland Herald*, 1 February 1976, 1, 8; "Mayo Case Proceedings Continued," *Rutland Herald*, 12 February 1976, 14; Rod Clarke, "Mayo Impeachment vote expected today in House," *Bennington Banner*, 10 March 1976, 18; Frederic Bayles, "Mayo Impeachment Report Lists Events," *Burlington Free Press*, 14 March 1976, 1, 2.

³⁴ *Journal of the Senate*, March 25, 1976, 420-429.

³⁵ Frederic Bayles, "Impeachment Witness Testifies," *Burlington Free Press*, 19 May 1976, 1, 6; John W. Reid, "Impeachment Procedures Cut New Legislative Paths," *Burlington Free Press*, 19 May 1976, 1, 6.

³⁶ Frederic Bayles, "Mayo's Senate Trial Opens,"

Burlington Free Press, 18 May 1976, 1, 3.

³⁷ John W. Reid, "Mayo Prosecutor Raps Vote, Quits," *Burlington Free Press*, 25 May 1976, 1, 2.

³⁸ Katherine Gregg, "Mayo Says May 28 Memo Was Mistake," *Burlington Free Press*, 28 May 1976, 1, 6; John W. Reid, "Mayo Goes on Witness Stand To Answer Accusers' Charges," *Burlington Free Press*, 26 May 1976, 1, 13; *Journal of the Senate of the State of Vermont, Adjourned Session, 1976* (Burlington, Vt.: Queen City Printers, 1976), 244-246, 352-356, 359, 420-429, 641; *Journal of the House of Representatives of the State of Vermont, Adjourned Session, 1976* (Burlington, Vt.: Queen City Printers, 1977), 407, 535, 557, 833; Transcripts of the House Judiciary Committee and the Vermont Senate, in the matter of the Malcolm (Mike) Mayo impeachment, State Archives.

³⁹ Jennifer Small, "Mayo Acquitted on One Article of Impeachment," *Brattleboro Reformer*, 27 May 1976, 1.

⁴⁰ Katherine Gregg, "Mayo Acquitted on 2 nd Charge," *Burlington Free Press*, 29 May 1976, 1, 3.

⁴¹ "Mayo Is Cleared By Vt. Senate," *Brattleboro Reformer*, 2 June 1976, 1, 8.

⁴² Elizabeth Slater, "Sheriff Mayo, Defeated For Re-election, Quits," *Rutland Daily Herald*, 7 December 1978, 4. John Meaker ran for Vermont Attorney General in 1976, and was defeated by M. Jerome Diamond in the General Election. Governor Richard Snelling appointed Meaker to the Superior Court in 1980. Meaker retired in 1999.42 Richard Davis, recognized as one of the state's greatest advocates, died in 1993. Rusty Valsangiacomo continues to practice law in Barre.

⁴³ *Mayo v. State*, 138 Vt. 419, 515 A.2d 1061 (1980).

⁴⁴ Chris Chinlund and Colin Nickerson, "Null Quits Post," *Rutland Daily News*, 6 April 1980, 1, 8; Candace Page, "Leroy Null Dies," *Brattleboro Reformer*, 14 April 1980, 1; <https://www.sec.state.vt.us/media/58987/Null.pdf>.

⁴⁵ *In re Kroger*, 167 Vt. 1, 702 A.2d 64 (1997); *In re Kroger*, 168 Vt. 602, 602-603, 718 A.2d 922 (1998).

⁴⁶ Frederick A. Wood, *The Finances of Vermont* (New York: Columbia University Press, 1913), 71; "An act relating to the sureties of the last state treasurer," *The Acts and Resolves passed by the General Assembly of the State of Vermont*, at the October Session, 1860 (Montpelier, Vt.: E.P. Walton, 1860), 12-13; "An act in addition to an act entitled 'an act relating to the sureties of the late state treasurer,'" *ibid.*, 191.

⁴⁷ "Sentenced, Then Pardoned," *Middlebury Record*, 11 November 1920, 3.



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WHAT'S NEW

COVID-19 Updates

The coronavirus pandemic began to impact Vermont during the final phase of this quarter's issue of the *Vermont Bar Journal*. While we thought some semblance of normalcy in issuing our regular publication would be welcome, we would be remiss without adding a late-entry section on the virus. Below are some excerpts of orders, guidance and communications relevant to our practices that we've shared at the onset of the crisis. Please continue to check our website and the VBA Connect communities for the latest information.

Between the creation of a dedicated COVID-19 resource guide on our website, weekly conference calls with Chief Justice Reiber, Judge Grearson and Pat Gabel, weekly conference calls with VBA Section and Division Chairs and County Bar Presidents, the efforts of our newly-formed COVID-19 Committee, and the outstanding contributions shared by members through VBA Connect, we're doing our best to keep you informed of the ever-changing legal landscape in these unique times. We are also working daily with the Legislature to advance emergency legislation designed to help you serve your clients while practicing social distancing. We remain very grateful for all that you in the Vermont legal community are doing to continue to "serve the public and the profession" in the face of unprecedented challenges. Please don't hesitate to contact us whenever we can be of help to you, and be well!

From VBA President's 3/19/20 Message:

Dear Members of the Vermont Bar:

We at the VBA don't want to inundate you with emails, but we also don't want you to miss the important resources that are available to you. We recommend that you check the VBA website¹ regularly. It's being updated daily with important information relevant to your practices concerning the COVID-19 crisis. The VBA Connect communities are also continually posting helpful information particular to the sections, with property law and family law being most active at this time; members can join however many sections they wish at no charge. Take advantage also of free upcoming webinars on virtual practice and wellness.

I'm also writing to otherwise share a sample of steps that the VBA is taking to serve the public and the profession. In response to the Supreme Court's Administrative Order 49 (AO 49) Declaration of Judicial Emergency, the VBA asked the Court for

regular conference calls to discuss how AO 49 is impacting our clients, members and other issues related to COVID-19. In conjunction with those calls, we've invited our VBA section chairs and the county bar presidents to participate in regular joint conference calls to assist us in a coordinated and efficient line of communication from all of you, through us to the Court. It is my hope that we continue the conference calls until the COVID-19 event ceases to impact our VBA community.

It's important that we hear from you regarding any issues impacting our members or their practices related to AO 49 and COVID-19 responses generally. During our calls with the VBA section chairs and county bar presidents we will discuss how best to gather that information from you.

We are also in the process of forming an ad hoc VBA COVID-19 Committee that will be tasked with gathering relevant information and resources to best assist Vermont lawyers and the Vermont community as we navigate the challenges facing us. The Committee will also work closely with organizers of a state-wide disaster relief program that's being set up to connect Vermont lawyers with Vermonters in need of legal assistance for issues related to COVID-19.

Also, I am exploring ways in which the VBA might support our more vulnerable members through this COVID-19 pandemic. I will update you as this unfolds.

Our VBA staff is working diligently to meet your needs as we navigate these uncharted COVID-19 waters. We are, for example, exploring ways to assist our members in meeting licensure and CLE requirements given the likelihood that live CLEs may not be available in the upcoming months. We will be offering a variety of online and webinar CLE options as a result.

I'd like to publicly express my gratitude to Teri Corsones and our talented VBA staff for their commitment to the needs of our membership.

Stay well,
Elizabeth Novotny, President
Vermont Bar Association

From the Vermont Supreme Court's Fourth Amendment (3/25/20) to A.O. 49:

Explanatory Note

The current COVID-19 pandemic forces the Judiciary to balance critical and to some extent competing objectives. Importantly, the courts play a critical role in

protecting individual rights and maintaining the rule of law that is the backbone of our constitutional democracy. The United States and Vermont Constitutions protect individual rights to life, liberty, and due process. "[T]he judiciary is clearly discernible as the primary means through which these rights may be enforced." *Davis v. Passman*, 442 U.S. 228,241 (1979). As James Madison said, independent courts "will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights" *Id.* at 241-42 (citing 1 *Annals of Cong.* 439 (1789)).

In addition, the work of Vermont's courts has a profound impact on the daily lives of Vermonters. Courts are charged with deciding critical questions related to the protection of children and the rights of their parents. The criminal justice system cannot fully function without the active engagement of courts. Rather than resorting to destructive self-help strategies, individuals and organizations rely on courts to resolve all manner of disputes by applying established legal principles. Families turn to courts to address vital issues, many involving urgent conflicts. And courts adjudicate civil petitions to protect individuals' safety.

Moreover, open trials are important to the administration of justice. As the U.S. Supreme Court has explained, "The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enter. Co. v. Super. Ct. of Cal., Riverside Cty.*, 464 U.S. 501, 508 (1984). For these reasons, we have recognized that the public has a "constitutional and common law right of access to court records and proceedings" *State v. Tallman*, 148 Vt. 465,472, 537 A.2d 422,427 (1987), and public judicial proceedings are the rule, and closed ones the exception. *Herald Ass'n. Inc. v. Ellison*, 138 Vt. 529,533,419 A.2d 323,326 (1980).

Nevertheless, the current public-health crisis arising from COVID-19, and the resulting declaration of a judicial emergen-

cy, reinforced by the Governor's declaration of a State of Emergency, calls for extreme measures to mitigate the impact of the pandemic. The Governor, based on evidence-based public-health concerns, has declared a State of Emergency in Executive Order O 1-20, and has augmented the restrictions in that Executive Order with a series of addenda imposing increasingly restrictive limitations on public gatherings and activities. Through our own Administrative Order, as amended from time to time, the Vermont Supreme Court has declared a judicial emergency and has implemented increasingly more expansive changes with respect to matters within our authority in an effort to meet the Judiciary's most urgent constitutional obligations while respecting the recommendations of public-health officials, mitigating risks to the dedicated public servants who work in the judiciary, and responding to the staffing challenges arising from the pandemic.

This ongoing process of responding to the evolving public-health crisis, balancing competing concerns, and adjusting court rules and operations will continue until this crisis runs its course. Some changes in court operations will require rule changes or amendments to this Administrative Order. Some operational changes, such as implementation of remote work for many Judiciary staff, fall within existing authority of the Court Administrator and do not require amendments to this Administrative Order.

The Court's initial order, on March 16, 2020, postponed superior court hearings in all but the most urgent cases—those most profoundly impacting individuals' personal liberty, safety, and family attachments. In those cases, the impact of inaction by the courts would be particularly substantial and enduring. In addition, in those cases, the Court sought to maximize the use of remote audio and video to minimize the number of individuals congregating for a hearing. In addition, the Court suspended all judicial bureau hearings as well as rules regarding court filings to allow individuals to use email for most court filings. The Court also suspended strict enforcement of timelines related to public requests for court records, while requiring reasonable efforts under the circumstances in response to public records requests. Finally, the Court imposed restrictions on access to court buildings to exclude anyone at high risk of infection pursuant to Department of Health guidelines, as well as anyone seeking to enter the courthouse for any purpose other than participating in or attending a public proceeding.

The March 18 amendment assigned the Supreme Court discretion to waive oral argument in its own proceedings, or to conduct those arguments by remote audio or video means. The amendment carved out

a narrow exception to the general suspension of nonemergency hearings for non-evidentiary, nonemergency hearings that could be conducted entirely remotely. This exception was limited by staff availability, and the amendment authorized the Court Administrator to make real time determinations as to whether and to what extent to schedule or conduct such hearings.

By amendment on March 20, the Court augmented its rule authorizing court filings by email to allow electronic signatures in lieu of "wet" signatures on such documents. It suspended the in-person participation requirement with respect to court-ordered mediation. And it limited the times and locations that Judiciary employees can conduct Judiciary business.

By amendment on March 24, the Court extended the duration of the restrictions on access to courthouses to be coterminous with the rest of the Administrative Order and made some technical corrections to that provision. In addition, the Court issued a host of general directives concerning committees, boards, and commissions established or governed by the Supreme Court. These measures included suspending in-person committee meetings; suspending most adjudicative hearings by boards except those necessary to protect the public; and authorizing email filings with these committees. The Court also authorized remote administration of the oath of admission to the Bar, and waived certain continuing legal education requirements for the license renewal period ending June 30, 2020. Finally, in recognition of the likelihood that public-health demands and reduced staff availability may require the Judiciary to find creative ways to address the most urgent cases, the Court invoked its statutory authority to make rules concerning venue to authorize the Chief Superior Judge, in consultation with the Court Administrator, to depart from the ordinary rules of venue in certain circumstances.

By amendment on March 25, the Court has adopted this Explanatory Note. The Court has further restricted public access to those court proceedings that are continuing pursuant to this Administrative Order. With narrow exceptions, only participants in those proceedings will be admitted to Judiciary courthouses. The Court has taken this extreme step in recognition of the Governor's March 24 Addendum 6 to Executive Order No. 01-20, which called for Vermonters to stay at home or in their place of residence, leaving only for essential reasons. The Court seeks to mitigate the Constitutional concerns raised by an order temporarily excluding the general public from court proceedings by including an exception allowing registered members of the media to attend court proceedings that are not otherwise confidential by law. Because



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of the administrative challenges of operating courts under current circumstances, the March 25 amendment provides that no new applications for one-time media certification will be entertained while this order is in effect. The amendment further urges all individuals admitted to a courthouse to observe social distancing.

From Reports on ACCD Guidance distributed by VBA Executive Director:

Updated ACCD Guidance as of April 17, 2020:

Attorneys are included in the newest April 17 guidance² from the Agency of Commerce and Community Development (ACCD) issued on Friday, April 17, effective April 20, 2020. The guidance differs from guidance in the past inasmuch as it allows in-person contact between a single attorney and a single client at a time provided the CDC and VT Dep't of Health safety requirements are met. Attorneys should continue to use their best judgment to determine what in-person activities are otherwise allowed under the various guidelines. The new guidance provides in part:

1.3 Low or no contact professional services

Services operating with a single worker (such as appraisers, realtors, municipal clerks, attorneys, property managers, pet care operators, and others) may operate if they can comply with the mandatory health and safety requirements . . . , with no more than 2 persons (service provider and client) present at one time. The mandatory VT Department of Health and CDC safety requirements include:

- Employees shall not report to, or be allowed to remain at, work or job site if sick or symptomatic (with fever, cough, and/or shortness of breath).
- All employees must observe strict social distancing of 6 feet while on the job.
- Employees must wear non-medical cloth face coverings (bandana, scarf, or non-medical mask, etc.) over their nose and mouth when in the presence of others.
- Employees must have easy and frequent access to soap and water or hand sanitizer during duration of work, and handwashing or hand sanitization should be required before entering, and leaving, job sites. All common spaces and equipment, including bathrooms, frequently touched surfaces and doors, tools and equipment, and vehicles must be cleaned and disinfected at the beginning, middle and end of each shift and prior to transfer

from one person to another.

- No more than 2 people shall occupy one vehicle when conducting work.

The ACCD guidance issued previously for legal services in different sectors (Financial, Legal and Professional Services; Municipalities; and Real Estate) have also been updated in light of the April 17 guidance. Each now provides:

Financial, Legal and Professional Services

Financial, Legal and Professional Services businesses must suspend in-person operations under the Governor's Executive Order unless specifically exempted or if they can comply with the April 17th guidance. Businesses in this industry that cannot transition functions to remote operations shall suspend those functions unless doing so would do harm to their client, or they can limit contact to a single individual. Examples of allowable in-person activities include meeting with a low-income client without access to internet to help them complete their tax return to ensure a timely refund (phone preferred if possible); an attorney meeting or representing a client facing imminent personal harm and no remote option was available; or a professional service provider working with a hospital, first response group, or business identified in the Executive Order. Those supporting a business or individual in recovery from COVID-19 impacts may also continue limited in-person services, including necessary banking, legal and professional services surrounding access to the Small Business Administration's recovery programs.

Municipalities

Municipalities may continue in-person operations under the Governor's Executive Order³ under certain circumstances . . .

Other business-related activities that are not providing services or functions deemed critical public health and safety or economic and national security are directed to either suspend in-person operations or comply with section 1.3 of the Agency's April 17th guidance concerning low- or no-contact professional services. Services such as land records and title searches; marriage license applications (see separate guidance on marriages); birth or death certificate searches; library lending are not considered critical to public health and safety or economic and national security and must only be done in accordance with the April 17th guidance. The Vermont Secretary of State's Office has provided guidance to local officials and municipal staff regard-

ing elections and Vermont's open meeting law, which can be found on the Secretary of State's website.

Real Estate

All professional services should be provided in a manner calculated to minimize in-person contact. Any activity that can be conducted remotely, online, by phone, or email, should be. The sale of real estate shall only occur within the confines of Section 1.3 of the guidance issued on April 17th concerning low or no contact professional services:

- Services operating with a single worker (such as appraisers, realtors, municipal clerks, attorneys, property managers, pet care operators, and others) may operate if they can comply with the mandatory health and safety requirements listed above, with no more than 2 persons (service provider and client) present at one time.

Real estate services, whether by real estate firms, brokerages, attorneys or individuals, must conduct as much work as possible remotely and change the way they have traditionally done business. However, the April 17th guidance deems real estate and associated services (such as title searches, appraisals, and home inspections), as low- or no-contact professional services and allows them to resume limited operations. Professionals must limit interactions to no more than 2 people (the professional and a client). Real estate open houses shall not occur, but scheduled property showings where no more than 2 people are present may occur. Title searches should be conducted by appointment. Appraisers should use drive by appraisals as an alternative to entering a home if possible.

¹ <https://www.vtbar.org/>

² <https://accd.vermont.gov/news/update-new-work-safe-additions-stay-home-stay-safe-order>

³ <https://governor.vermont.gov/content/addendum-6-executive-order-01-20>



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WHAT'S NEW

Professional Responsibility and Coronavirus

As I mentioned this morning, the Rules of Professional Conduct are rules of reason. Here are some thoughts on practicing reasonably during a public health crisis.

Competence & Communication

• Current Events

To me, competence includes understanding the effect that current events have on the representation.

For instance, on March 16, the Supreme Court adopted Administrative Order 9. It's an emergency order that addresses judicial operations and it has been amended [four] times.¹

Yesterday the Governor issued the "Stay Home/Stay Safe" order.² It's the sixth addendum to an Executive Order that issued on March 13....

Competence includes understanding how the Judicial and Executive orders apply to you and your clients. It also includes staying abreast of new orders as they're issued. Your duty to communicate with clients likely includes explaining to them how the orders will impact their matters.

• Emergency Advice & Assistance

Competent representation includes having the knowledge and skill required for the representation. However, here's Comment [3] to the rule on competence:

"In an emergency a lawyer may give emergency advice and assistance in a matter in which the lawyer does not have the skill ordinarily required [and] where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest."

Diligence & Communication

Rule 1.3 requires lawyers to act "with **reasonable** diligence and promptness" on behalf of clients. Rule 1.4 requires lawyers to keep clients **reasonably** updated as to the status of their matters, to provide clients with enough information to make **reasonably** informed decisions about their matters, and to respond to clients' **reasonable** requests for information.

In my opinion, when it comes to assessing reasonableness, context matters. Conduct that might have violated the rules last summer, might not now. While lawyers cannot abandon or ignore clients, I'd argue that they can keep the bigger picture in mind when prioritizing their days.

What if you become unavailable?

I have not shown any symptoms. Still, who knows what the future holds? So, today, I recommended that the Professional Responsibility Board plan for my unexpected unavailability. Develop a roster of lawyers able to do my job if I can't. In my mind, I thought of it as my "*Amii Stewart Recommendation*." Because babe, as I was drafting it, I guaran[tee] you that I knock-knock-knocked on wood!³ In short, none of us is immune.

Comment [5] to Rule 1.3 suggests that diligent representation includes having a plan to protect clients' interests if a lawyer is incapacitated. This is particularly important for sole practitioners.

For now, and given the duties of competence, diligence and communication:

- Who will contact clients, courts, and opposing counsel if you are incapacitated?
- Who will deliver files, return unearned funds, check your calendar?
- Who will check email, voice mail, the U.S. mail?
- Who will handle hearings or events that have not been suspended or postponed?

My post on succession planning is here.⁴ My post on disaster planning is here.⁵

KEY! If you have a succession plan, make sure someone knows where it is and who to contact when it's triggered.

Your clients aren't immune either. Rule 1.2(a) requires a lawyer to abide by a client's decisions concerning the objectives of a representation. What if a client cannot communicate their decisions to you?

Well, Rule 1.14 applies whenever a client's capacity to make adequately considered decisions about the representation is diminished, no matter the reason. Initially, the duty is to maintain as normal a client-lawyer relationship as possible. At some point, doing so is no longer possible. Thus, the rule specifies situations in which a lawyer will be authorized "to take reasonably

necessary protective steps" or "to make express considered judgments about the matter."

In my view, and at the risk of being promoted to Captain Obvious*, it's best that the client makes the decisions that the rules envision the client making. For now, some lawyers might have clients from whom it makes sense to seek advance direction, especially in matters with critical decision-points imminent.

*or would it be a demotion? I've always wondered which way the chain-of-command flows on obviousness.

Client Confidences and Working Remotely

I'm not sure what number immediately precedes "infinity." Whatever it is, it's the number of times that I've blogged or said that a lawyer has a duty to take reasonable precautions to safeguard client information, including reasonable precautions to prevent that inadvertent disclosure of or unauthorized access to client information.

Most of you are working from home. Do you have a dedicated workspace away from curious ears or bored and prying eyes? Are you working on a device that's connected to others in your home? Are you on public Wifi? Are you – gasp! – chipping in with your neighbor to share the same Wifi? Should you set up a VPN?

Important considerations.

Trust Accounting

Got this question from 3 different firms: no, Vermont's rules do not prohibit an electronic signature on a trust account check.

Civility & Cooperation

99.99% of you rock. I heard one story, however, that saddened & maddened me. I urge all lawyers to be accommodating when considering requests for accommodations that are related to COVID-19. Rescheduling, postponing, extending a deadline, you name it.

On that note, here's an uplifting story. Judge Amy Totenberg is a United States District Judge in Georgia. Last week, Judge Totenberg issued an order related to court operations during the crisis. The order included:

- "Be kind to one another in this most stressful of times. Remember to main-

tain your perspective about legal disputes, given the larger life challenges now besetting our communities and world. Good luck to one and all.”

[...]

Conclusion

I know you are all doing your best. I am too. I'm not trying to scare you; I'm trying to lend guidance by sharing some of the considerations to keep in mind as you make decisions. Please continue to contact me with specific questions. This post was general, for a broad audience. I didn't ad-

dress every question I received this week, several of which related to duties and rules not discussed here.

Still, I'll end as I began: the rules are rules of reason. In my opinion, no matter the duty or rule you're analyzing, there is nothing unreasonable about acting in such a way as to minimize the risk of spreading or acquiring a deadly virus.

Peace.

In the meantime, keep on knockin'.

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¹ Mike's original blog was published when there were three amendments and the blog linked to each amendment. See the VBA's website or the Judiciary website for all of the Orders.

² <https://governor.vermont.gov/content/announcement-6-executive-order-01-20>

³ https://youtu.be/i071rR_W6MM

⁴ <https://vtbarcounsel.wordpress.com/2017/11/02/got-plans/>

⁵ <https://vtbarcounsel.wordpress.com/2018/09/19/is-your-firm-prepared-for-a-disaster/>



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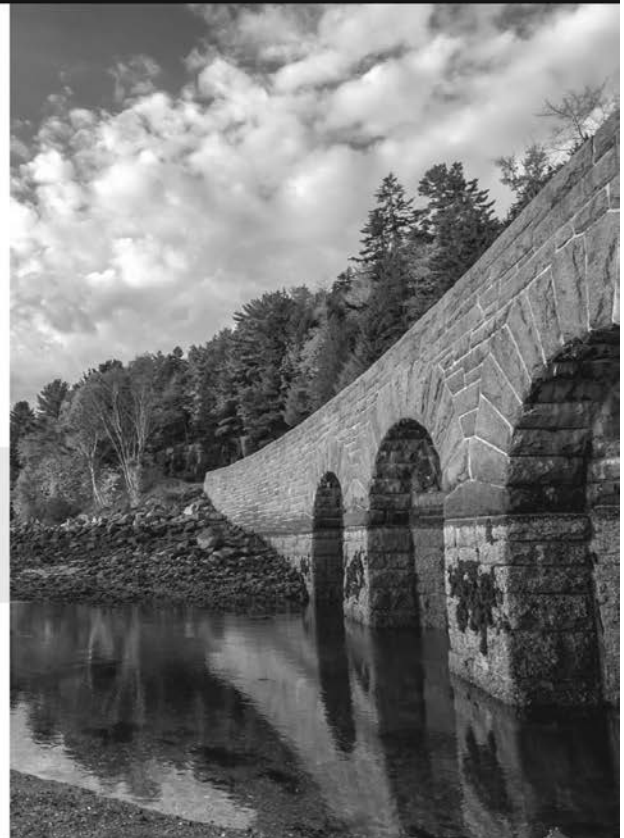
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BE WELL

Time for Holistic Spring Cleaning

*"If you get the inside right,
the outside will fall into place."
~Eckhart Tolle~*

Now is the perfect month to implement spring cleaning, but with a holistic twist. Instead of merely focusing on cleaning (and sanitizing) your external environment and living space, expand into your inner space or more specifically, your mind. This is an important shift because I have found that my inner landscape is mirrored externally as my mind creates my outer perception or my reality. But, don't take my word for it. Try it! Pick a habit or thought pattern that doesn't serve you, let it go and see what changes externally.

*"When you correlate the changes you've made inside of you with the effect you produced outside of you. You are going to pay attention to what you did and you're going to do it again."
~ Dr. Joe Dispenza ~*

Here are some ways you can let go:

1. **Things** – As Marie Kondo says: "The space in which we live should be for the person we are becoming now, not for the person we were in the past." So, look around your physical spaces in your home or working environment and take inventory. What is serving you? What isn't? What brings you joy? What doesn't? Make space for what matters most in your life.
2. **Relationships** – Take a look at your relationships. Are the people in your life strengthening you, inspiring you, lifting you up, and helping you grow? Or are they limiting you, holding you back, and preventing you from growing? We can make choices about with whom we spend our valuable time, so choose wisely.
3. **Emotions** – If you are holding on to anger, resentment, or heartbreaks, let them go. Forgive those who have hurt you. Forgive yourself. Emotions become stored in our bodies leading to energy blockage, inflammation and disease. As the Buddha says: "Holding on to anger is like grasping a hot coal with the intent of throwing it at someone else, but you are the one who gets burned." I have also heard that resentment is like a poison we take, thinking it will hurt someone else.
4. **Thoughts** – Reflect on those thoughts and habits which lift you up and those that



bring you down. Are there negative loops spinning in your mind? Worrying, organizing, overthinking, replaying, etc. What can you change about your thoughts right now? Developing the self-awareness to even know you are having thoughts and then to observe them are HUGE STEPS, so be easy on yourself. Practice patience because if you try to rush things, you often end up with something of lesser value.

As I teach in my mindfulness CLE workshops, when you cultivate self-awareness and are able to use this awareness to reduce your automatic reactions while moving towards conscious responses, you become superhuman to some extent. Not many are able to even attempt to become present and use that awareness to fully show up in their lives with love, compassion and kindness. We use mindful movements, breathing and awareness to get us to the present moment. When you are present, you are able to settle the body down and begin to become the master of your emotional and physical reactions.

Dr. Joe Dispenza states: "...(w)hen you master your emotions, you master your creations, period...When you take your attention off that person or that condition in your life, you are breaking your energetic bond with that person or that situation. And this is when we turn back into possibility, back into energy. You are taking your power back – your permission to create again."

So, join me this Spring to create space in your body, mind and life for what you want to bring forward in 2020! Become the conscious and deliberate creator of your life!

Spring Mantra Practice

A mantra is a word or phrase that is repeated often or that expresses someone's basic beliefs. I think of mantras as small affirmations that are repeated inside your interior space that are positive, uplifting and filled with self-love to motivate you even when everything feels like it is falling apart. And even if I am not truly "feeling" the mantra, I just keep repeating it and eventually something shifts within my vibrational space and I am there. Embodying it. So, I encourage you to choose one of these powerful self-loving mantras to memorize or modify for your own specific needs, making space to just repeat it. You never know. It could change your mind. It could change your life because there is no separation between the body and the mind. If the mind thinks it, the body responds.

This mantra is especially powerful in the aim to create space. Chant it internally or out loud for 3-5 minutes a day. If you can't do a full five minutes, start with two minutes, and finish with 2-3 more minutes later the same day.

"Inhale - Let. Exhale - Go."

Samara Anderson is a Legal and Policy Advisor for the State of Vermont, Agency of Human Services, a Registered Yoga Medicine™ Yoga Teacher and a social entrepreneur teaching mindfulness to stressed professionals and creating a non-profit community farm in Vermont to use farm animals, nature and mindfulness to heal people. She co-chairs the VBA Lawyer Well-Being Section.





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VBF GRANTEE SPOTLIGHT

WomenSafe

The Vermont Bar Foundation (VBF) continues its series highlighting grantees that provide legal services for low-income Vermonters. Through IOLTA monies and other contributions, the VBF is able to help fund a range of competitive and noncompetitive grants throughout Vermont. WomenSafe ("Center") based in Middlebury, Vermont is one grant recipient.

WomenSafe has been advocating for Vermonters across the gender spectrum for over 40 years. The IOLTA grant funds received by the Center has provided countless hours of legal services to people experiencing physical, emotional and sexual violence in Addison County. In the past year, the Center has assisted survivors by interfacing with the legal community through the Addison County Legal Clinic, State's Attorney's Office and private attorneys. WomenSafe staff and volunteers work with the legal community to support survivors in relief from abuse cases, parentage cases, and criminal cases. This legal assistance includes advocating for detailed parentage orders, which provide for specific supervised visitation, in a safe setting.

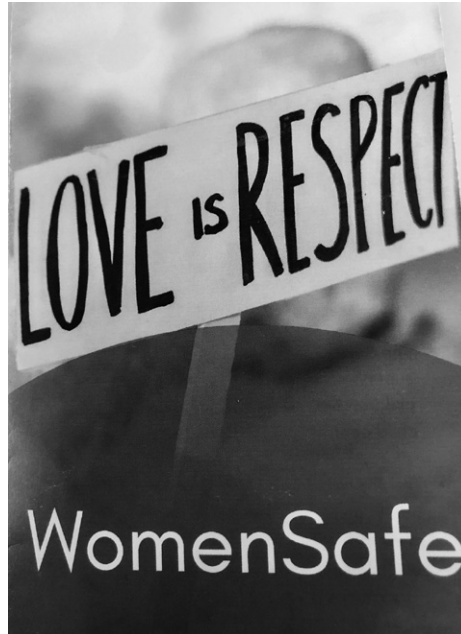
In early February, I had a chance to speak with WomenSafe Executive Director, Kerri Duquette-Hoffman, and Services Director, Christina Grier. It was important for them to point out the resourcefulness and resiliency of the survivors who access their services on a daily basis. The Center served 515 people with a total of 4,800 in-person meetings and telephone calls during the fiscal year of July 1, 2018–June 30, 2019. Their data indicates that the program worked with relatives and caregivers of a total of 325 children affected by domestic violence. (WomenSafe, 2019)

Mission Statement

"WomenSafe works toward the elimination of physical, sexual, and emotional violence through direct service, education, and social change."

Crisis Hotline and Advocacy

WomenSafe provides a 24-hour hotline (802-388-4205), which is staffed in part, by the more than 75 community members who donate their time to WomenSafe. This hotline is confidential and provides direct access advocates for persons in crisis. WomenSafe volunteers donated approximate-



ly 8,691 volunteer hours through the hotline, in-person meetings, court accompaniment, administrative support and board leadership. (WomenSafe, 2019)

Training & Education Program

The Center's Training & Education Program reaches approximately 2,572 adults and youth, with 355 prevention workshops, presentations, and professional trainings. 11 elementary schools, 4 middle schools and 2 high schools along with the Northlands Job Corps, have all received training and educational programs. Kerri and Christina indicate that topics include boundaries, anatomy, consent and communication, and empathy-building skills. These programs are taught to children enrolled in pre-school through high school. Research-informed strategies like bystander intervention prevention are highlighted. WomenSafe interacts with the adult community by facilitating support groups at local Middlebury College and throughout Addison County. Participants in these groups discuss a variety of topics which may include healthy relationships, preventing child sexual abuse, consent, sexual harassment, dating violence and social media. Approximately 948 adults and youth participated in community outreach programs during WomenSafe's 2018-2019 fiscal year.

Supervised Visitation Program

WomenSafe has a Supervised Visitation Program which is housed at its Middlebury location. Last year, the Center completed 213 supervised visits and monitored 23 children needing what the Center identifies as "children needing increased safety" during parent-child visitations. (WomenSafe, 2019). Many supervised visitations at WomenSafe are included as part of parent-child contract orders issued by the court system.

Transitional Housing Program

While Vermont's rural landscape has made access to WomenSafe's services somewhat difficult for survivors outside of the Middlebury area, Kerri and Christina state that the lack of affordable housing is probably one of the biggest deterrents to their clients. In 2018-2019, WomenSafe assisted 23 adults and 12 dependents in locating and securing housing. In recognition of the growing need for housing, WomenSafe itself is expanding its own program with the purchase of a home in the Middlebury area. This transitional housing will provide much-needed relief for survivors and their families. This project was a labor of love for the staff of the Center, and they are excited to bring this transitional housing opportunity to their network of clients.

Kerri and Christina are happy to share successful and empowering stories from survivors who use their services. While lack of transportation, poverty, and yes, even weather, are barriers to service here in Vermont, WomenSafe continues to be a beacon for Vermonters in Addison County experiencing physical, sexual and emotional violence.

Sarah Wilson, Esq. has a general practice in Bennington, Vermont and serves on the Board of Directors for the Vermont Bar Foundation.



Thank You for Supporting Pro Bono Services

The Vermont Bar Foundation is our conduit to using IOLTA (interest earned on lawyers' trust accounts) monies as well as direct contributions to fund a variety of non-profit organizations that provide needed civil legal services and education for low-income Vermonters throughout the state.

All Vermont-licensed attorneys in active status, as well as all justices and judges, are members of the Vermont Bar Foundation (VBF). The monies from IOLTA accounts are the main source of the VBF funding but are insufficient to meet the full need for legal services. Your continued support plays an important role as the VBF strives to meet its mission to fund needed civil legal services.

In 2019, the VBF awarded \$856,754 and

supported 12 programs. These programs include the Children First! Legal Assistance Project and Vermont Immigrant Assistance Project at the South Royalton Legal Clinic, VBA's Low Bono County Projects, Vermont Legal Aid, Have Justice Will Travel, Orleans County Restorative Justice Center, and local domestic violence programs such as Steps to End Domestic Violence. A full list of current grantees can be found at www.vtbarfoundation.org.

The VBF thanks lawyers, the judiciary, Prime Partner institutions, and the corporations who contribute financially. Your gifts include:

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We thank the many lawyers who provide pro bono and low bono assistance. They provide an invaluable service to Vermonters in need and to assisting the efforts of our grant programs.

Contact Deborah Bailey at dbailey@vtbarfoundation.org or at 802-223-1400 for information how to maximize IOLTA account interest rates or to donate.

Listed below are the individuals and law firms who donate to the Vermont Bar Foundation in 2019.

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Third Annual Martin Luther King, Jr. Poster Essay Contest for Middle School Students

Impressive Submissions Once Again!

For the third year in a row, the Vermont Bar Association, in partnership with the Diversity Section and Young Lawyers Division, sponsored a Martin Luther King, Jr. Poster-Essay Contest to celebrate the life and message of the late Dr. Martin Luther King, Jr. The contest was open to all Vermont middle school students, including those from public schools, private schools and home schools. This year the students were asked to create a poster and write a short essay interpreting what Dr. King's quote: "True peace is not merely the absence of tension; it is the presence of justice" means to them. Inasmuch as the quote is associated with the Montgomery Bus Boycott, resources regarding the boycott and Dr. King's connection with the boycott were also provided with the contest materials. A committee comprised of representatives from the Diversity Section, the YLD, and the VBA selected one winner and two runners-up from many creative and thoughtful entries submitted from throughout the state.

Governor Phil Scott presented awards to the winning students at the Statehouse on January 22, 2020. The team of Nicolas Milazzo and Zachary Davis, 8th graders from Poultney High School, were presented with first-place plaques and a traveling trophy for their school. Their winning submission featured a drawing of Dr. King addressing a diverse crowd of peaceful protesters. Noting how Dr. King's message at the Montgomery Bus Boycott still resonates today, they explained in their essay: "You shouldn't ignore things that bother you. You must do something about them."

Elizabeth Cunningham, a 7th grader from Edmunds Middle School in Burlington, received the first runner-up plaque for her poster depicting a scene from the Civil War, the famous Woolworth's

lunch counter in Greensborough, North Carolina, and a dove carrying an olive branch connecting the two scenes. Elizabeth explained in her essay how although the end of the Civil War resulted in an end of warring tensions, a lack of justice eventually led to the Civil Rights Movement in which Dr. King played such an instrumental role. She also explained how the dove symbolized peace; "the core value of Dr. King."

The team of Kaitlyn DeBonis and Courtney Ezzo, 8th graders from Poultney High School, received second runner-up plaques for their submission, featuring a shadow outline of Dr. King speaking, the scales of justice, and the subject quote. Noting that "the inspiration of his words are still affecting people today," the team used vivid colors to symbolize Dr. King's creativity, imagination, trustworthiness, dependability and strength.

The students were photographed with their winning submissions and Governor Scott. The Governor spoke of the importance of Dr. King's message, and how we must look to today's youth to be tomorrow's leaders. He encouraged young people to work together to find solutions, to see the good in everyone, and to live by the golden rule. He then visited with each of the winners to discuss their work and presented the awards to them.

After the ceremony, the group attended a statehouse tour and then were invited to the Vermont Supreme Court where they were greeted by Chief Justice Paul Reiber and Justices Karen Carroll, Harold Eaton and William Cohen. Justice Reiber congratulated the students and spoke to the importance of Dr. King's legacy. The students and their families enjoyed a light reception and a tour of the Supreme Court conducted by Justice Eaton. The students' posters and essays were on display at the Supreme Court building throughout the month of January.



Guidelines to Closing Your Law Practice

A lawyer can decide to close her practice for any number of reasons. Disability, retirement, disbarment, a move out-of-state, or a career change are the more common ones we hear. While the specific steps that need to be taken can vary significantly depending upon the reasons behind the closure, this article seeks to provide some general guidance on the principal issues that will arise. At the outset, understand that in many instances the process of properly closing a law practice can easily take six to twelve months and sometimes longer because the obligations to protect client confidences as well as the interests of the client make closing a law practice more difficult than closing other types of businesses. Finally, note that jurisdictional rules do differ and a review of your local rules and ethics opinions, perhaps coupled with a call to your local bar counsel would be well advised early on in the process.

The first step one should take after making the decision to close is to determine what files can be finalized prior to closing and then seeing that enough time is set aside to enable you to follow through. This does mean that you will need to make a decision as to when to stop taking on new matters and also when to notify staff as they will be interacting with the public as well as current and past clients once the news breaks.

The second step is to write and send a letter to all clients with active matters that cannot be closed in order to advise them of the upcoming change. Typically, these letters will inform the client of any relevant time limitations or time frames, provide instructions as to how and where they may obtain a copy of their file, and advise them to find a new attorney as quickly as possible. An offer to assist the clients in finding a new attorney by providing a few names or the phone number to a local lawyer referral service would also be appropriate. Don't overlook the importance of setting forth your file retention policy and providing post closure contact information in the event a client needs a copy of their file at some later point in time. It is for this reason that some jurisdictions also require that a similar letter be sent to past clients. Where called for, these initial letters are usually followed up with a full accounting of client funds that remain in the trust account and/or a statement of fees owed by the client.

As clients respond to these letters, re-

member to retain your original file and return to the client any original documents and/or client property such as original wills, deeds, stock certificates, signed contracts, promissory notes, etc. Again, clients get copies of your file; you get copies of their original documents. Don't forget to document the disposition of the files in case questions come up post closure. Have clients sign an authorization to release their file to their new attorney or sign an acknowledgement that they picked up a copy of their file.

On matters that have pending court dates, depositions, or hearings, have a conversation with the client in order to discuss how to proceed. A request to reset a hearing or a request for an extension or continuance may be called for and, once received, confirmation of the granted request should be sent to opposing counsel and your client. For cases before a court or administrative body, obtain client permission to submit a motion and order to withdraw as the attorney of record and at an appropriate time verify that all motions to withdraw have been granted. If the client has obtained a new attorney, make certain that a Substitution of Counsel is filed.

If, over the course of your career, you failed to review and destroy old files that no longer needed to be retained, now is the time to begin. The costs to continue to maintain closed files can be significant and you have an ethical obligation to take care of this. Don't burden a spouse by leaving this for them to deal with should your spouse outlive you.

When you originally closed the file, you should have separated all the original documents that belong to the client and re-

turned them to the client. If you did not, do it now. In fact, a review of every file prior to destruction is a good idea as sometimes original documents were overlooked when the file was initially closed.

Remember that in most jurisdictions the file belongs to the client and some clients will want their original file as opposed to having it destroyed. This means that you can't simply decide to destroy client files absent client awareness and approval. If you did not obtain the client's instructions when you closed any given file, seek those instructions now. Many attorneys will simply send letters to their clients' last known addresses. Once you learn their wishes, carry them out. If you are going to destroy a file, make sure you follow through with the notion of destruction. "Destruction" does not mean leaving the file in a dumpster behind the office. You should incinerate or shred these files. You cannot compromise your client's confidences, even in file destruction. Again, document your actions. Track the client name, file matter, method of disposition (destroyed, returned) and date of disposition.

Turning to one specific business concern, contact your malpractice insurance carrier well in advance of closing. The purpose is to begin the process of learning about the options for obtaining an extended reporting endorsement (ERE - more commonly referred to as a "tail policy"). This endorsement is not a new policy. It simply provides an attorney the right to report claims to the insurer after a policy has expired or been cancelled. Again, it is important to note that under most ERE provisions the purchase of the endorsement is not one of additional coverage or of a separate and dis-



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tinct policy. This means no coverage will be available for a wrongful act that takes place during the time the ERE is in effect. So if a claim arises several years post retirement out of work done in retirement, for example writing a will as a favor for a friend, there would be no coverage for that claim under the ERE. That's worth remembering.

ALPS Risk Manager Mark Bassingthwaighe, Esq. has conducted over 1,000 law firm risk management assessment visits, presented numerous continuing legal education seminars throughout the United States, and written extensively on risk management and technology. Check out Mark's recent seminars to assist you with your solo practice by visiting our on-demand CLE library at alps.inreachce.com. Mark can be contacted at: mbass@alpsnet.com.

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The SECURE Act Changes How Beneficiaries Inherit Retirement Accounts

On December 20, 2019 the "Further Consolidated Appropriations Act, 2020" became law. As part of the Act and in part to pay for the over 1.7 trillion in spending that the Act contemplates, Section "O" sets forth the Setting Every Community Up for Retirement Enhancement Act (the "SECURE Act"). The SECURE Act significantly changes the distribution rules for beneficiaries of tax-deferred retirement plans and individual retirement accounts, that in turn have a major impact on the estate planning landscape for retirement benefits.

This article briefly summarizes key changes and new distribution planning possibilities as a result of SECURE. However, there are a host of exceptions to the new regimen and planning options that are beyond the scope of this article. In addition, clarifying regulations and guidance from the Internal Revenue Service will be necessary to determine the full scope and implications of the provisions. Careful review of the SECURE Act, any clarifying regulations, and client estate planning documents is critical for estate planning practitioners and retirement plan account owners alike to determine what changes, if any, are necessary under SECURE.

As a preliminary matter, the SECURE Act applies only to "certain defined contribution plans". Defined benefit plans, including certain annuity payouts from an IRA or other defined contribution plan that were already finalized prior to the enactment of SECURE are not affected. In this article, "account owner" is used to mean the employee in a qualified defined contribution plan or the owner of an individual retirement account.

The Prior Rules

Prior to SECURE, the distribution rules for retirement plan death benefits were set forth in section "B" of § 401(a)(9) of the Internal Revenue Code. Section "B", as substantially enhanced by the Treasury Regulations, provides for several benefit payout methods depending on whether the account owner had started taking distributions from the plan prior to death and whether the beneficiary is a "designated beneficiary."

Under the rules, a "designated beneficiary" is an individual, or group of individuals, specifically named by the account owner. A trust can also qualify as a designated beneficiary if it meets certain requirements. Any other beneficiary, such as a charity, or an estate, is, for the purposes of this article, referred to as a "non-designated beneficiary."

The prior rules are generally as follows:

- If the retirement account owner named a designated beneficiary of his or her plan, upon the death of the account owner, the balance of the account could be distributed in annual installments over the life expectancy of the designated beneficiary, unless taken sooner as elected by the designated beneficiary or as otherwise required under the plan.
- If the plan is distributed to a non-designated beneficiary and the account owner had not yet started taking distributions from the plan at his or her death, the non-designated beneficiary is required to withdraw the benefits within 5 years after the owner's death.
- If the account owner died after his or her required distribution beginning date, a non-designated beneficiary takes distributions in annual installments over what would have been the remaining life expectancy of the account owner if he or she had not died.

Additional rules applied if the designated beneficiary was the surviving spouse of the account owner. Further, under the prior rules, if a designated beneficiary died before the end of his or her life expectancy payout period, the next beneficiary in line (whether or not qualifying as a designated beneficiary) could withdraw over the remaining life expectancy of the original designated beneficiary.

The Addition of SECURE

SECURE does not amend or replace section "B" nor does it change the definition of "designated beneficiary." Instead, SECURE adds a new section "H" to § 401(a)(9) of the

Internal Revenue Code. On top of the existing rules, "H" layers a new payout period requiring designated beneficiaries to withdraw all plan funds within 10 years. This new 10-year payout period replaces the life expectancy payout method under the prior rules, with the exception of five categories of "eligible designated beneficiaries" ("EDBs").

As a result of the new section "H", there are now three classes of retirement account beneficiaries: 1) designated beneficiaries, 2) EDBs and 3) non-designated beneficiaries.

The new class of EDBs include the surviving spouse of the account owner, a minor child of the account owner, a disabled or chronically ill beneficiary, and a beneficiary who is less than 10 years younger than the account owner. For each of these EDBs, the life expectancy payout method will still apply, with some exceptions. Notably, the life expectancy payout method expires when a minor child of the account owner reaches the age of majority, at which time the 10-year payout rule will apply.

The specific language in SECURE implements the 10-year rule by referring to the 5-year rule (see discussion under Prior Rules above). To date, this has been interpreted to mean that the new 10-year rule will be applied in the same manner as the 5-year rule. As such, the inherited retirement account must be liquidated by December 31 of the year in which the 10th anniversary of the account owner's death occurs. This means if the account owner dies early in the year, there are close to 11 tax years over which the designated beneficiaries may take withdrawals and liquidate the account.

Importantly, the only minimum distribution that is required under the 10-year rule is the liquidating distribution at the end of the 10th year. However, a beneficiary can always take distributions sooner. A beneficiary

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should work with his or her professional advisors to determine the most effective way to utilize plan distributions.

Upon the death of any EDB, the exception ceases to apply and the 10-year rule will apply for the recipient of any remaining funds.

See-Through Trusts

One common estate planning technique used to control the disposition of retirement account funds is the use of "see-through trusts." See-through trusts can still qualify as beneficiaries under the new regime created by SECURE. However, retirement account distributions to and from these trusts may not operate in the same manner contemplated when the trusts were created under the prior rules.

There are two types of see-through trusts. One is a "conduit trust" that requires the trustee to immediately distribute funds withdrawn from a retirement account to the individual trust beneficiary or beneficiaries. With SECURE, if the primary beneficiary of a conduit trust is an EDB, generally the life expectancy payout granted to the EDB will apply. If the beneficiary of a conduit trust is not an EDB, then the trust, and that beneficiary, must receive an outright distribution of all of the retirement benefits within 10 years of the account owner's death.

The other see-through trust is an "accumulation trust" that does not require the trustee to distribute funds withdrawn from a retirement account immediately to the trust beneficiary or beneficiaries. With the exception of certain trusts for the sole life benefit of disabled or chronically ill beneficiaries, an accumulation trust must take distribution of the entire plan balance within 10 years after the account owner's death. The beneficiary or beneficiary will in turn receive distributions from the trust as determined by the trustee or as required by the terms of the trust.

Estate Planning Considerations

The impact of SECURE on a client's overall estate plan will depend entirely on the

client's personal situation and goals for the beneficiaries of his or her retirement plan.

A client who simply leaves his or her retirement account outright to various individuals, such as adult children, may have nothing to change. The children will have to pay taxes sooner than was previously expected, but the resulting tax is precisely what SECURE was enacted to address, and as such there is little to be done in this regard.

Similarly, accumulation trusts will still work under SECURE, but the trustee will be faced with a substantially accelerated tax bill, since all benefits must be distributed to the trust, at the trust's high tax rates, within 10 years. As with outright beneficiary designations, there are limited options to avoid this tax. A major exception are certain trusts for the sole life benefit of a disabled or chronically ill beneficiary. If a client's estate plan includes a disabled or chronically ill individual, in-depth review of the client's estate plan and SECURE exceptions is critical to ensure compliance with the new rules.

A conduit trust will also still work under SECURE. However, if a client strongly favored the gradual payment of funds over a trust beneficiary's lifetime, and created a conduit trust relying on the lifetime expectancy payout method, the client will need to explore other options to avoid distribution of the plan funds to said trust beneficiary within 10 years of the account owner's death.

While many planning techniques were not specifically invalidated as a result of SECURE, the changes may result in distributions that are contrary to the intent of the account owner. As a result, all beneficiary designations and estate plans should be reviewed to determine what changes, if any, are necessary to effectuate a plan that will accomplish an account owner's goals.

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Paralegal Licensure is a Solution - Part 2

The Vermont Joint Commission on the Future of Legal Services, at the urging of Vermont Supreme Court Justice Reiber, provided its Final Report and Recommendations to the Vermont Bar in September of 2015 on how to increase access to justice for Vermonters.

Within the Joint Commission's Report was the Legal Education Committee's strong recommendation that Vermont adopt a paralegal licensing program. Unfortunately, this recommendation has since languished, but the problems with access to justice in Vermont remain.

Members of the VBA Paralegal Section, Carie Tarte, Corinne Deering, Lucia White and Lynn Wdowiak, in conjunction with Dan Richardson, then-President of the VBA when the Joint Commission Report was issued, examine whether or not Vermont is ready for paralegal licensure and whether or not paralegal licensure is an appropriate solution to Vermonters' lack of access to justice.

This is the second in a two part series that explores whether Vermont is ready for some form of voluntary paralegal licensure and whether paralegal licensure can increase Vermonters' access to justice. The first part was published in the 2019 Winter edition of the Vermont Bar Journal.

Is Vermont Ready for Independent Paralegals?

Paralegals working independently or semi-independently within the legal system is a current reality. Paralegals do title searches and real estate work. They represent the state in child support hearings. They manage and oversee various components of litigation. They do intake and client management. They are essential parts of a family law practice, and every one of us knows a lawyer who is somewhat of a front for a sharp paralegal who is the office's real power. Any handwringing that we as a profession express over this fact is akin to the concern that individuals once expressed about those dangerous automobiles running their buggies off the road.

The fact of the matter is that paralegals acting independently in their myriad forms are here and here to stay. As a profession, our challenge is to meet this reality, to ensure that the public is protected from any issues or abuses of this system, and to see whether this area can expand our ability to provide greater access to the legal system.

When we think about the issue of paralegals or any issue concerning changes to the profession, it is useful to think of the med-

ical profession. One hundred years ago, the medical profession had more in common with the legal profession. The practice of medicine was dominated by doctors who practiced alone or in small firms. They had to dun clients for payment, modify the scope of services based on a patient's ability to pay, and they often had to argue with a patient about why a particular medical process was necessary. Doctors did not have physician assistants, nurse practitioners, registered dietitians, or any of the various medical professionals that we take for granted. They also lacked the substantial infrastructure that we associate with medicine today. Doctors relied more on their wits and diagnostic skills than technology and support teams. Today, medicine is institutionalized. We go to university-run medical systems where we are surrounded by technology, and we are treated by teams of para-professionals. If we see a doctor, it is usually momentary or for something serious.

Looking by analogy to the changes of the medical practice to understand the potential for the legal profession is a helpful exercise. This is not to say that the future of the legal profession lies in the same direction, but it is instructive to see how that profession incorporated its para-professionals into an integrated practice where each professional supports the other and puts the patient/client at the center of the system. As we consider our future, it is only sensible

to start with the same approach. To look at what is best for the client—and by extension the public—and what builds the profession into a collaborative and integrated system that supports the array of services that we offer or could offer in pursuit of resolving our clients' issues and disputes.

What is a Paralegal?

The best place to start any inquiry is to identify the players as it were. When we talk about paralegals, we need to acknowledge that this term in Vermont is nearly meaningless because of the wide expanse it covers. A paralegal in Vermont is someone who has a legal education, extensive training, and certification. A paralegal in Vermont is also someone who just started work at a firm yesterday without any legal education, training, background, or certification. It also includes everyone in between.

At the same time, paralegals can largely be grouped into one of three categories. The first group are those paralegals that have an educational background, training, and certification that qualifies them as paralegals. They have often graduated from a paralegal program and they have the formal training that puts them on a track similar to an attorney who went to law school and passed the bar. The second group are those paralegals who lack the formal education or training but who have had extensive

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experience through years of paralegal work to function at an equivalent professional level. These paralegals are often older and pre-date the more formal educational programs now available. They are similar to attorneys that rose through the clerkship program and who read for the law. The third and final category are those individuals without education, training, or experience that have been hired by a firm or agency and given the title paralegals. In some cases, these individuals are doing paralegal work under the close supervision of an attorney or doing administrative work for which their more general skill set is suited.

If we propose to give paralegals more independence and the ability to perform more substantial representation, then we necessarily have to cull these categories to create more formal lanes so that the untrained administrative assistant who is called a paralegal is not allowed to represent clients in a technical hearing. As a modest proposal, we should be limiting the title "Paralegal" to those individuals who through training, education, and/or experience have substantive knowledge of legal issues, practice, and procedure. In this respect, the title should have more meaning than we currently give it. This would elevate paralegal from its catch-all meaning to something similar to a physician's assistant or nurse practitioner. It would also signal to those of us in the profession and to the general public that this individual has a specific skill set that rises to a higher level of professional ability.

What Level of Education and Experience are Appropriate?

Nearly a decade ago, Washington state changed the conversation around legal paraprofessionals by creating the Limited Licensed Legal Technician (LLLT). The instinct behind this change was both noble and necessary. The Washington Supreme Court looked at the decline in available legal services and the growing gap in access to justice, and the Court acted to create a professional class that could address these needs. Unfortunately, the program has had several problems that have kept the numbers low. First, the Court created a program out of whole cloth, which meant that anyone wanting to become an LLLT had to start from the beginning. There was not economic model or existing practice to join. In this respect, the risk was put entirely on the putative LLLTs to seek the education and licensure, and then build a practice from scratch. If you were unsuccessful, there was no backup plan.

Adding to this entrepreneurial risk is the burden of education. LLLTs must have at a minimum an associate-level degree, 45 credit hours in the core LLLT law school-level curriculum, and 3000 hours of experience.¹ This is a substantial investment for anyone. The question is whether such training and education makes a difference.

If Vermont proposes to license paralegals, there should be some education component, but this education should not be restricted. There should be grounding in is-

sues of constitutional law, civil procedure, and legal profession, but there should be an emphasis on the practical. At the same time, this education should be developed and tailored so that anyone who wants to become a Licensed Paralegal—whether a student, an individual looking for a career change, or an assistant in a law firm looking to better him or herself—can take the requisite education without having to drop everything and effectively enroll in law school.

At the same time, there is a reason for rigor in legal education. The more independent paralegals are, the more they will have to know (and in a Socratic manner, know what they do not know). Education should rise above a CLE level to one of formal training and should emphasize the areas where they will be focused.

How independent should paralegals be?

This is an issue of some debate, and the reality is that just as we do not have nurses doing brain surgery, there are some roles that attorneys must continue to perform. But the question of what paralegals can and cannot do is not the key issue in defining the independence of a paralegal. Instead, the key question is whether paralegals should be licensed to work independent of law firms, like LLLTs, or if they should be required to be affiliated, associated, or directly employed with a law firm.

In many ways, this is the key question for paralegal license. Too much independence, and there have to be risk mitigation steps

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like education and experience (as in the LLT case), or complicated practice rules so that paralegals look more and more like attorneys. Too little independence, and licensure becomes meaningless as everything is run through an attorney as it is now. But whichever the direction, we have to think of legal services like integrative health.

Paralegals should have a certain level of professional independence, but it should be in a way that encourages them to work with law firms. Paralegals should be another tool for the public to receive meaningful assistance. Whether the paralegal's job is to help a client fill out a form, draft a motion, issue a simple residential title opinion, or appear in court at a status conference, the role should not (and in practice does not) exist in a vacuum outside of the existing and traditional world of legal practice.

This is an urge for moderation. We should not be re-inventing the wheel with paralegal licensure. We should be taking an existing profession and elevating it. We need to recognize the professional already calling themselves paralegals and allow them to offer additional services that will assist those members of the public not being served by the legal profession as currently constituted.

What are the jobs that a paralegal can handle?

This is really a question of need and ability. Look at the court docket in Vermont, the need exists in family law, creditor/debtor law, administrative law, landlord/tenant, and probate/guardianships. These are the areas where people are foregoing legal representation largely because they cannot afford it. They are also the areas where lawyers are not practicing. These are all areas where we should be looking to empower and deploy paralegals to fill a need.

These are also areas where paralegals could make the greatest impact. These are high volume dockets where a reasonably priced paralegal could help navigate, for

example, the 813 financial disclosure at the beginning of a divorce that would short circuit later disputes. A number of these dockets are form-driven dockets where a paralegal could navigate for clients and get them through the preliminary filings and substantially close to a resolution.

The elephant in the room when lawyers talk about paralegals is trial work. Many attorneys are skeptical that a paralegal could manage and conduct a trial. There is some truth to this. Trial work is like surgery. It is complex, requires nuance, and it carries high stakes. But we also have to recognize that the trial format is an endangered species. More and more dispute resolution and legal work is done behind the scenes and on paper. In this respect, a paralegal should be able to carve out a deep but narrow channel of proficiency. In probate, for example, the filing and administration of an estate is a skill. It has legal components to it, but no one part dominates in complexity. They are all fairly straightforward. A seasoned paralegal with experience in such areas is going to be better at such work than an attorney who has not done an estate in several years.

In the end, the answer to this question should lie with a committee of paralegals, judges, and lawyers who can work out the limits, but if the paralegal is working with an attorney or has that support through an association, there is no objective reason to believe that the paralegal cannot perform specialized legal tasks or that such tasks should be limited to drafting or informal research.

What needs to change and what does not?

As a way of concluding, this portion of the article was originally commissioned as a counter-response to the idea of paralegals exercising independent authority as a profession. The fact of the matter is, however, that we cannot afford to sniff at such ideas as the legal profession must come to grips with the changing nature of society, the gap in who can afford to access the legal sys-

tem, and even the efficacy of the system to resolve disputes. Despite changes, the adversarial trial system remains one of the most powerful tools ever created for resolving disputes and protecting the democratic process in society. A public forum where citizens can file and air grievances against each other and the state, where disputes and estates are resolved, and where criminal prosecution takes place under the due process of law are foundational pillars of society. Formalizing and expanding the role of paralegals and other par-professionals within this structure does not erode the foundation. Instead, it gives us more support.

Change is coming. Every major internet retailer or service provider (like Amazon, Ebay or AirBnB) has its own electronic dispute resolution mechanism. As a result, a growing number of commercial disputes have been effectively eliminated from the judicial process. This is both good (speedy, efficient, and generally satisfactory resolutions) and bad (the system is owned and controlled by one of the parties, does not allow for due process, and may result in inadequate outcomes). If we, as a profession do not look for ideas that improve our system, then the public will find other solutions. This, in turn, undermines the role of the courts and the legal process that protects us all. Creating licensed paralegals or similar licensure for paraprofessionals makes sense. We, like our peers in the medical profession, need to make that leap to expand the offerings to the public and to ensure that legal representation is a meaningful concept. To that end, licensure that builds on the best of the existing paralegal profession is sensible and timely.

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¹ Washington State Supreme Court Admission and Practice Rules 3 and 5.



Part 1 of this article can be found in our Winter 2019 edition and was written Carie Tarte, RP, AIC, Corinne Deering, RP, and Lucia White, CP.

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Kosovo: International Criminal Justice in Slow Motion

“A room inside this yellow house, the journalists reported, had been set up as a makeshift surgical clinic; and there, doctors extracted the captives’ internal organs.” (Carla Del Ponte, *Madame Prosecutor*, 2008, at 276).

These words by Carla Del Ponte, former chief prosecutor of the International Criminal Tribunal for the Former Yugoslavia (ICTY), would ultimately lead to the creation of an entirely new international criminal court in The Hague, officially known as the Kosovo Specialist Chambers and Specialist Prosecutor’s Office. It opened in 2017 after nearly a long decade in the making.

The court’s exclusive mandate is to prosecute high ranking veterans of the Kosovo Liberation Army (KLA)—an ethnic Kosovo Albanian guerilla and separatist group—for human organ trafficking, war crimes, crimes against humanity and other serious offenses. These offenses were allegedly committed against Serbs, as well as ethnic Albanian and Roma collaborators, and even against Albanian political opponents, during and shortly after the disastrous war between Kosovo and Serbia in the late 1990s.

While the initial rationale for a new court outside of Kosovo was arguably justified at the time of its creation, primarily because of witness intimidation, its evolution has proven to be a case study in international criminal justice in slow motion with serious negative consequences.

This article will trace the development of the tribunal which by April 2020 still had not performed any significant judicial functions. The alleged perpetrators, almost all of whom are prominent today in Kosovo’s government and society, have been allowed to go about their lives with impunity. And the surviving victims of these crimes, as well as the families and loved ones of the 1,600 persons still missing, have been forced to grieve in a constant state of uncertainty as the wheels of justice grind slowly forward. (The missing persons include not only victims of KLA criminality noted above, but Albanian victims of rampant Serbian criminality during the war. The ratio is unknown, but Serbian atrocities are generally considered to have been far more widespread.)

Introduction

Following my retirement from the Vermont bench in 2005 after 21 years, I became actively involved in international rule

of law work, with numerous short-term assignments in Russia with the Vermont Karelia Rule of Law Project as well as a short-term assignment in Kazakhstan. I also had a one-year residential posting with the American Bar Association Rule of Law Initiative in Georgia, a former Soviet republic, in 2008-09.

I then accepted an international judgeship with the European Union Rule of Law Mission in Kosovo (EULEX) for twenty-eight months from 2011 to 2013. There, I served on three-judge panels (no juries) adjudicating war crimes, judicial corruption, narcotics trafficking, human organ trafficking, murder and other serious cases, all of which I described in the Spring 2017 issue of the Vermont Bar Journal.¹ Unfortunately, creating an entirely new judicial system rather than improving and utilizing EULEX’s system has been one of the main reasons for the inordinate delay.

The genesis for the new court takes us back to 1999 soon after the war ended. But first it is important to understand the historical context.

Brief History

Kosovo was part of the Ottoman Empire for centuries, but was merged into Serbia within greater Yugoslavia following the Empire’s defeat in the Balkan War of 1912. Following WWII, Yugoslavia became a communist federation of Balkan countries (Bosnia, Croatia, Macedonia, Montenegro, Serbia and Slovenia) which was ruled by the iron hand of Marshal Tito. During Tito’s rule, Kosovo enjoyed a period of autonomy within Serbia. He died in 1980, and Yugoslavia began to slowly disintegrate.

Although Kosovo was part of Serbia, it was populated overwhelmingly by ethnic Albanians. They were Muslims, spoke Albanian, and used the Latin alphabet. The minority Serbian population was Orthodox Christian, spoke Serbian, used the Cyrillic alphabet, and resented Kosovo’s autonomy. There was serious tension between the Albanians and Serbians, which Slobodan Milosevic, the Serbian leader of Yugoslavia, exploited when he rose to power in the late 1980s. In 1989, the Serbian minority took control of Kosovo through intimidation and force, and the Albanian majority was oppressed and marginalized.

This gave rise to the Kosovo Liberation Army (KLA), which formed clandestinely in the mid-1990s and engaged in terrorist tac-

tics aimed at Serbian targets like government officials and police officers in Kosovo. Milosevic then unleashed war and ethnic cleansing upon Kosovo in 1998-99, killing thousands and causing nearly a million Kosovo Albanian refugees to flee into neighboring countries. It was the worst humanitarian crisis in Europe since World War II.

On March 24, 1999, NATO commenced its bombing campaign to stop the crisis, and Milosevic capitulated that June. The Kosovo refugees flooded home, only to find widespread destruction and a total upheaval of society resulting in large scale retribution against the remaining Serbian population. The KLA was considered NATO’s ally on the ground, and KLA soldiers were seen as freedom fighters, liberators and war heroes, and are still highly revered today, despite allegations of serious revenge-type crimes as previously noted.

After the war, the United Nations Mission in Kosovo (UNMIK) took control of Kosovo, and rebuilding the judiciary was an immediate priority. It recruited international investigators, prosecutors and judges to deal with war crimes and other serious cases. UNMIK was “status neutral,” meaning that KLA fighters and Serbian soldiers and paramilitaries were all subject to prosecution.

Starting in 2008, UNMIK began handing its responsibilities to the European Union Mission in Kosovo (my employer), which carried forward the international judicial model, and was likewise status neutral. On February 17, 2008, Kosovo unilaterally declared independence from Serbia with the support of the US and most of the EU countries. The declaration was subsequently upheld by the International Court of Justice in 2010.

Today, Kosovo, a nation of about two million people, is recognized by over one hundred countries including the US, but not by Serbia, Russia, several EU countries and most international organizations. EULEX departed in 2018, except for a small contingent, and returned all governmental functions including the judiciary back to local authorities.

The Montgomery Investigations

In July 1999, shortly after the war’s end, and while chaos and lawlessness engulfed Kosovo, an American investigative journalist named Michael Montgomery, who was working for the London *Daily Telegraph*, returned to Kosovo to produce a documen-

tary about a purported Serbian massacre of Kosovo civilians in the town of Cuska. Montgomery heard from various sources that the Kosovo Liberation Army had also engaged in atrocities including organ trafficking. As he explained years later at a conference in Belgrade, Serbia (emphasis added):

At that time [1999] we heard that there were people – Serbs, Roma, some Kosovo Albanians – killed by the Kosovo Liberation Army, and they simply vanished and it was very strange and we started looking into that.

And because of our work in Cuska, we got very good sources on the Kosovo Albanian side and we started talking with low levels of the KLA and they started telling us these stories of captured civilians being moved across the border to Albania.

We had multiple sources but not everything lined up. **We had people who heard that people have been taken away for their kidneys.** There were couple of houses we were able to locate where these things allegedly happened, but we decided we didn't have enough information to publish and that at the time our evidence didn't support the allegations.²

However, Montgomery sent a memorandum outlining his findings to the UN Mission in Kosovo and the International Criminal Tribunal for the Former Yugoslavia, but no further investigation was done by these institutions for several years. In 2004, Montgomery returned to Albania with a team of investigators from both UNMIK and the ICTY to

investigate the claims of organ trafficking.

They went to a yellow house where they discovered medical paraphernalia in an outside trash heap-- pieces of gauze, a used syringe, and empty intravenous drip bags—and spatters of blood in the house that could not be credibly explained by the owner. However, the evidence was deemed insufficient to warrant any criminal charges. The investigation was dropped, and inexplicably the evidence was later destroyed at the ICTY.

Carla Del Ponte's Allegations

In 2008, Carla Del Ponte, former ICTY chief prosecutor from 1999 to 2007, authored a book titled: *Madame Prosecutor. Confrontations with Humanity's Worst Criminals and the Culture of Impunity*. She claimed that the KLA had committed serious crimes such as abductions, murder, torture and forced disappearances. And, citing credible journalists, whom she did not name but clearly included Montgomery, she claimed that during the summer of 1999, one hundred to three hundred captives, including Serbian prisoners, Albanian collaborators and certain ethnic minorities, were taken forcibly across the Kosovo border into Albania. There, they had their organs extracted as part of an international trafficking ring run by members of the Kosovo Liberation Army.

As she wrote:

A room inside this yellow house, the journalists reported, had been set up as a makeshift surgical clinic; and there, doctors extracted the captives' internal

organs. These organs were then smuggled [out of Albania] for transplant into paying patients in surgical wards abroad... Victims deprived of their first kidney were sewn up and confined again inside the shack until they were killed for their other vital organs... According to the sources, the smuggling operation occurred with the knowledge and active involvement of mid- and senior-level KLA officers.³

This was the first time that allegations of organ trafficking were brought to the public's attention. They had not been prosecuted by the ICTY for reasons Del Ponte explained: no bodies, no witnesses, no confirmation that the blood in the yellow house was human, no one willing to talk, and no corroborative evidence beyond the medical paraphernalia. Also, there was a serious jurisdictional issue since the ICTY's mandate was limited to crimes committed during the war which ended in June 1999, and it was unclear whether any of the crimes alleged by Del Ponte did so.⁴

Del Ponte's shocking allegations received world-wide publicity. For example, *The Guardian* ran an article in its online edition in April 2008 with this headline: "Former war crimes prosecutor alleges Kosovan (sic) army harvested organs from Serb prisoners."⁵

The Marty Report

Del Ponte's allegations, although widely derided in Kosovo, led the Parliamentary Assembly of the Council of Europe to appoint one of its Senators named Dick Marty



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from Switzerland, to conduct a thorough investigation into her claims. For reasons that are unclear, this was not a criminal investigation so another time-consuming investigation would become necessary further on.

Marty and his team conducted the investigation for two years and produced a dense 27-page report in December 2010 titled "Inhuman treatment of people and illicit trafficking in human organs in Kosovo." Despite challenges in conducting the investigation, such as fear on the part of potential witnesses to testify against the KLA war heroes, he claimed that he found evidence corroborating Del Ponte's allegations of organ trafficking, although on a dramatically reduced scale, as well as other serious crimes.

He identified by name the alleged perpetrators who were all members of the so called Drenica Group, named after the birthplace of the KLA. The Group included many high-ranking KLA commanders who had become leading political figures after the war including the then prime minister (and now president), Hasim Thaci.

As stated in the Report (footnotes omitted, emphasis added):

61... [A]ccording to well-substantiated intelligence reports that we have examined thoroughly and corroborated through interviews in the course of our inquiry, Thaci's "Drenica Group" built a formidable power base in the **organised criminal enterprises** that were flourishing in Kosovo and Albania at the time.

...

72. Our first-hand sources alone have credibly implicated [these Drenica Group members] alongside Thaci and other members of his inner circle, in having ordered – and in some cases personally overseen – **assassinations, detentions, beatings and interrogations** in various parts of Kosovo and, of particular interest to our work, in the context of KLA-led operations on the territory of Albania, between 1998 and 2000.

Marty then elaborated on his findings of organ trafficking (footnotes omitted, emphasis added):

156. The last and most conspicuous subset of captives in the post-conflict period, not least because its fate has been greatly sensationalised and widely misunderstood, comprises the captives we regard as having been the "victims of organised crime". Among this subset are a **handful of persons** whom we found were taken into central Albania to be murdered immedi-

ately before **having their kidneys removed** in a makeshift operating clinic.⁶

Marty's report sent shockwaves throughout Kosovo and around the world, even though he downplayed the allegations of organ trafficking. For example, *The Guardian* ran an online story on December 4, 2010 titled, "Kosovo PM is head of human organ and arms ring, Council of Europe reports."⁷ The sub-headline stated that a "Two year inquiry accuses Albanian 'mafia-like' crime network of killing Serb prisoners for their kidneys."

Marty's report was also widely denounced in Kosovo as false and biased against the KLA liberators. Nevertheless, the report was officially adopted by the Council of Europe in January 2011. The Council urged EULEX, the entity then in charge of Kosovo, to launch a full-scale criminal investigation.

In September 2011, EULEX authorized a criminal investigation to be headed by an American, Clint Williamson, who was an experienced war crimes prosecutor and the former U.S. War Crimes Ambassador at Large. It was headquartered in Brussels, and named the Special Investigative Task Force, or SITF. Its mandate was to investigate and, if warranted, prosecute those individuals identified in the Marty Report and any others who might be implicated for organ trafficking and other series crimes that might be uncovered.

The SITF Report

Nearly three years later, in July 2014, Ambassador Williamson issued a report outlining his findings.⁸ He referred to the extremely challenging nature of the investigation, echoing Del Ponte and Marty: the events occurred years ago, there is little physical evidence, many witnesses have become unavailable, others could not be located, and the climate of intimidation.⁹

But the report continued as follows (emphasis added):

Despite these difficulties, I am convinced that SITF has conducted the most comprehensive investigation ever done of crimes perpetrated in the period after the war ended in Kosovo in June 1999. As a result of this investigation, **we believe that SITF will be in a position to file an indictment against certain senior officials of the former Kosovo Liberation Army.** These individuals bear responsibility for a campaign of persecution that was directed at the ethnic Serb, Roma, and other minority populations of Kosovo and toward fellow Kosovo Albanians whom they labeled either to be collaborators with the Serbs or, more commonly, to have simply been political opponents

of the KLA leadership.

Information compiled by SITF indicates that certain elements of the KLA intentionally targeted the minority populations with acts of persecution that included unlawful killings, abductions, enforced disappearances, illegal detentions in camps in Kosovo and Albania, sexual violence, other forms of inhumane treatment, forced displacements of individuals from their homes and communities, and desecration and destruction of churches and other religious sites.¹⁰

On the subject of organ trafficking, Williamson said (emphasis added):

I can say at this point, that **there are compelling indications that this practice did occur...and that a small number of individuals were killed for the purpose of extracting and trafficking their organs.** This conclusion is consistent with what was stated in the Marty Report, namely that a "**handful**" of individuals were subjected to this crime....Statements that have been made by some implying that hundreds of people were killed for the purpose of organ trafficking are totally unsupported by the information we have and that Dick Marty had.¹¹

Despite the compelling indications of organ trafficking, even on a much smaller scale, Williamson said that "in order to prosecute such offenses, however, it requires a level of evidence that we have not yet secured."¹² While Williamson, like Marty, downplayed organ trafficking, it nevertheless garnered the headlines. For example, the online media outlet *EURACTIV* ran this headline on July 29, the day the report was released: "KLA guerrillas harvested murdered Serb's organs, say EU investigators."¹³

Even though SITF had enough evidence to file an indictment in 2014, Williamson stated that, "In regard to those crimes for which SIFT has prosecutable evidence, the filing of an indictment will not occur until the specialist court designated to hear these cases is established—hopefully early next year," meaning early 2015.¹⁴ Opting for a "specialist court" was a critical decision in this saga, but Williamson's prediction of early 2015 turned out to be wildly optimistic.

Why a Specialist Court?

EULEX already had a fully functioning international judicial system in Kosovo for at least five years which included: experienced international investigators, prosecutors and judges; court security; court facilities; administrative personnel; multi-lingual trans-

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lators; rules of evidence and procedure; a witness protection program; penal facilities; and all other features of a workable court system. In addition, Kosovo was just about to open its brand-new Palace of Justice where all judicial activities would henceforth take place. This new court facility, which had been largely funded by the EU, could have been available for KLA trials.

And EULEX had already prosecuted high profile perpetrators of war crimes and other serious offenses, including organ trafficking. Indeed, I was a member of the three-judge panels that presided over the war crimes trial of KLA soldier Ejup Kabashi (2011) and the *Medicus* organ trafficking trial (2011-13) which gained worldwide attention. Both cases resulted in convictions (followed by complicated appellate proceedings.)¹⁵ There were several other examples as well, both before and after the decision was made to create a specialist court.

Nevertheless, the international community agreed with Williamson about the necessity for a new court, primarily because of great concern for witness protection. There is a clan mentality in Kosovo, and it was considered just too dangerous to expect witnesses to testify in a Kosovo courtroom against the highest level of Kosovo war heroes. The witnesses and their families could be in great danger, and it was believed that many witnesses would simply refuse to testify if the proceedings were conducted in Kosovo.

I experienced this problem first-hand in the war crimes case of Fatmir Limaj (one of the persons named in the Marty Report) and nine other KLA soldiers and commanders (2011-12). On the eve of trial, the prosecution's key witness, who was in EULEX's witness protection program, committed suicide by hanging himself in Germany where he had gone to visit his brother. This severely undermined the prosecution's case, and the defendants were ultimately acquitted.

Security was clearly another important concern in high-profile cases. During the Limaj proceedings, for example, the courtroom was packed with his supporters as was the street outside the courthouse, and SWAT teams with AK47s were deployed inside and outside to maintain order. I had to go back and forth to court in an armored vehicle.

Conducting future proceedings in a neutral country, with better witness protection and without similar security concerns, won the day. Arguably, this seemed to make good sense at the time, assuming the new court could be up and running quickly, although it was not to be.

So the EU, with the support of the US, decided to create an entirely new court. But first, the Kosovo Assembly had to pass constitutional amendments and a law establish-

ing and governing the court. This finally occurred in mid-2015, but only after intense international pressure. As described by *Balkan Insight* on August 6, 2015:

The...Law...which was negotiated between the EU and Kosovo, was finally passed this week by the Kosovo Parliament after months of bitter arguments, street protests, frenzied media speculation and delays caused by political opposition to the legislation that will see former KLA guerrillas—who are seen as heroes of the liberation struggle in Kosovo—put on trial.¹⁶

The new creation, the Kosovo Specialist Chambers and Specialist Prosecutor's Office (KSC and SPO), would be located out of the country. The two entities were independent, with the KSC constituting the judicial and administrative components and the SPO constituting the traditional prosecutorial function.

Setting up the Specialist Chambers

At this point in mid-2015, the evolution of the new tribunal was only about six months behind Williamson's schedule of early 2015. The timetable then began to deteriorate markedly. The job of actually setting up the Chambers had to be tackled, and it became a major bureaucratic undertaking that took two full years.

The task required entering into a host state agreement with the Netherlands; refurbishing a large building in The Hague; hiring a whole new court staff including administrators, IT personnel, translators, security experts, and the like; recruiting and hiring a cadre of international judges and law clerks; establishing rules of procedure and evidence; developing a witness protection program; and so forth, all of which was time consuming, labor intensive and expensive. And much of which was duplicative of EULEX's judicial system in Kosovo.

David Schwendiman, a respected and internationally experienced American prosecutor who succeeded Clint Williamson as the head of SITF, was appointed as the first Chief Prosecutor of the Special Prosecutor's Office in September 2016. But the investigation continued with no indictments, and there was never an explanation about what happened to the indictment that could have been filed in 2014.

The budget for the KSC and SPO from June 15, 2016 to June 14, 2018 was a whopping £70,000,000.. (The value of a Euro as compared to the US Dollar fluctuated during this period from a low of about \$1.04 to a high of about \$1.25). The Chambers finally opened for business in July 2017. Although it was now about two and a half years behind Williamson's proposed schedule, the

KSC, on a positive note, claimed to be fully ready to proceed with judicial proceedings whenever the Prosecutor filed indictments. But more time passed with no indication when the indictments would be filed.

Then in December 2017, when many in Kosovo mistakenly believed that indictments were imminent, the Association of KLA Veterans petitioned the Assembly to dissolve the new court because of its purported bias, targeting only Kosovo Albanian KLA veterans and not any suspected Serbian war criminals. As reported by the *New York Times* on January 13, 2018:

Efforts by Kosovo to suspend a war crimes court set up to prosecute atrocities committed by ethnic Albanians during their independence struggle are threatening relations with Western allies who backed Kosovo's split from Serbia, European and American officials have warned.

In December, a group of law makers, mostly KLA veterans, tried to rush through a vote in Parliament that would suspend Kosovo's law that regulates the court. The vote never took place, but its sponsors claimed to have the support of President Hashim Thaci, who was previously accused of leading an organized crime network.¹⁷

The strategy to abrogate the court ultimately fizzled in the face of withering criticism from Kosovo's international benefactors, including the US and the EU. Then in February 2018, David Schwendiman, the Chief Prosecutor, made a surprise announcement that, reluctantly, he would have to leave his position. On March 22 he gave a farewell address in which he offered an explanation: "I did not resign—I was just told by my government that my time was up."¹⁸

He explained in detail the challenges he faced in conducting an extremely complex investigation (hundreds of thousands of documents, hundreds of witnesses), and at the end of his remarks he admonished the international community to be patient:

Donors who sign on to support these kinds of investigations and prosecutions must re-orient their thinking to ensure that political will does not wain and a loss of interest does not interfere in the short or long-term with the institutions created to do the work.¹⁹

No indictments had been filed by the time he left, and no successor had been named. Regardless, he deserves credit for his dedicated service.

I expressed my strong skepticism about the new court because of the inordinate delay in an article for *Balkan Insight*, titled

"Ghost Court," just before Schwendiman left office.²⁰ The essence of my argument, as published, was as follows:

... [T]he new court's evolution stands as a stark example of international criminal justice in slow motion--good intentions gone awry and the rule of law stuck in quicksand. Today, the court has yet to receive any indictments to adjudicate, despite a multi-year birthing process and a massive budget...

The tragedy of delay is two-fold. First, alleged perpetrators of heinous crimes have been allowed to go about their lives with impunity.

But more importantly, and I can't emphasize this point enough, the victims and their families have been forced to twist in the wind of uncertainty far too long, waiting for justice to be served. And the 1600 missing persons, many of whose photos are posted outside the Parliament building, have not been vindicated for their suffering. Even if the court started adjudicating cases tomorrow, the years of delay, uncertainty and anguish could never be recouped.

Staying the course with EULEX, which had a fully functioning justice component, would have been a far better choice than starting anew. True, EULEX had its problems, but these problems could have been ameliorated, if not solved, if a concerted effort had been made to do so.

.....

Accountability for crimes by members of the KLA, and justice for the victims and their families, are important goals in international law that cannot be forgotten by the passage of time. But the passage of time makes it more and more difficult to achieve these goals as we are seeing. Witnesses die or disappear, witnesses forget, witnesses are threatened or killed, family members die, perpetrators die or disappear, key personnel resign, evidence is lost, stories change...

If indictments had been filed with EULEX in 2014 when Williamson had enough evidence to do so, the cases would probably be nearing completion by now. Instead, the victims and their families continue to wait and hope for justice to be served.²¹

Recent Developments

Following Schwendiman's departure, another experienced and respected American prosecutor, Jack Smith, was hired and sworn in about six months later on September 11, 2018. Again, expectations ran high that indictments would soon be filed, but Smith needed time to get up to speed and more

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time passed with no charges being laid.

However, starting in December 2018, a flurry of activity emanated from the Special Prosecutor's Office, with its staff of about 60 people. According to reports, over one hundred former KLA soldiers and commanders were interviewed, either as suspects or as potential witnesses, and these interviews continued throughout 2019. Among those summoned were the prime minister, who promptly resigned, and the speaker of the assembly, both of whom were identified in the Marty report. However, there has been no mention of President Thaci being interviewed although he was identified as the mastermind. This accelerated pace suggested that the SPO could be getting close to deciding whether to file indictments and against whom.

All the while, the Specialist Chambers continued to expand despite the absence of any judicial activity. They moved into a new, high tech building in The Hague, generously paid for by Norway in the amount of NOK 80,000,000 (about \$8,700,000), with a staff of around 150 from many different countries throughout Europe and beyond. And there was another budget allocation from the EU for the period June 15, 2018 to June 14, 2020 in the amount of £86,000,000. Thus, the total budget since June 15, 2016 was a staggering £156,000,000, with only a short time to go before yet another budget allo-

cation would be necessary.

The nineteen judges appointed to the Roster of International Judges three years ago in February 2017, all Europeans except for one American (three of whom have since resigned), have been largely out of public view. They have been waiting in their home countries for the criminal cases to be initiated and the trials to begin.

While waiting for indictments, the Chambers have kept themselves busy by hosting international organizations, meeting with journalists and students, presenting training programs and performing other activities in preparation for the Chambers' primary and essential function, conducting judicial proceedings whenever that might happen.

The Chambers have also engaged in outreach efforts in an attempt to persuade skeptical Kosovo Albanians of the legitimacy and necessity of the tribunal, but with questionable success. A recent report by Aidan Hehir, an expert in transitional justice from Westminster University in the UK with whom I have collaborated, had this to say:

At present the KSC [the Kosovo Specialist Chambers] suffers from both a lack of domestic support—particularly among Kosovo's Albanian community—as well as very low expectations as to its ability to achieve its aims. The court is seen by the majority of the

Kosovo Albanian community as an unwarranted foreign imposition, and unfairly focused on Albanians. Within this community, there remains a clear lack of understanding as to the KSC's mandate and working methods, there is little acceptance that the court is necessary, and the very idea that KLA fighters committed crimes is widely disputed.²²

On December 20, 2019, the Chambers began publicly recruiting ten additional judges for the Roster of International Judges. The application deadline was March 17, 2020, with interviews to follow soon thereafter. Although the Prosecutor's Office closely guarded its activities, this was another strong signal that indictments could be filed in the not too distant future. Since the judges presently on the roster had been largely idle, there would be no need for more judges unless the Chambers had reason to believe that indictments would soon be filed. But past predictions had proven woefully wrong.

As it turned out, this prediction actually proved to be accurate. On February 24, the Prosecutor finally notified the President of the Chambers of his intent to initiate judicial proceedings and requested that a judge be appointed to review the indictments for factual and legal sufficiency pursuant to the code of criminal procedure. If satisfied, the judge would "confirm" the indictments and refer the cases to the trial docket. If not, the indictments would be dismissed. As of this writing there has been no word as the status of this judicial review or when it might be completed. Unfortunately, fate also intervened, making it likely that the review and any ensuing trials will be further delayed because of Covid-19 which has swept through the Netherlands and the rest of Europe.

Conclusion

Even with the filing of indictments, this cannot in any way mitigate the endless pain endured by the victims and their loved ones occasioned by the inordinate delay in this

glacial process. In the immortal words of Benjamin Franklin, "lost time is never found again." Nor will the filing at long last provide an adequate explanation for why the perpetrators of horrific crimes have been permitted to remain at large in plain view for so long. And, importantly, a lengthy delay such as this can only undermine the credibility of international justice and the public's faith therein.

As of April 2020, it has been nearly twelve years since Carla Del Ponte publicly set the wheels of this endeavor in motion in 2008; nine years since the Council of Europe adopted the report of Dick Marty in January 2011; almost six years since Ambassador Williamson determined in his benchmark report that he had enough evidence to file an indictment in July 2014; almost five years since the Kosovo Assembly passed the law establishing the Chambers and Prosecutor's Office; nearly three years since the Chambers opened for business; and a year and a half since the latest prosecutor was appointed. All at an astronomical expenditure of EU funds.

While I do not wish to minimize the complexity of the investigation, or the professionalism and dedication of the persons involved, the immutable fact is that process has simply taken far too long. And while it's easy to be critical in hindsight, it might well have been better to solve the problems with the existing judicial mechanism of EULEX in which event the perpetrators likely would have been held to account by now, and the victims and loved ones would have received a well-deserved measure of justice. But the long wait persists. Unfortunately, as we all know, justice delayed is justice denied.

Before his appointment to the Vermont trial bench in 1984, Judge Pineles served as an Assistant Attorney General, Deputy Health Commissioner, Commissioner of Labor and Industry, and Legal Counsel to Governor Richard Snelling. He is a graduate of Brown University, Boston University School of Law and Harvard Kennedy School. He divides his time between Stowe, Vermont

and Washington, DC. He can be reached at pineles@pshift.com.

¹ The Vermont Bar Journal, Spring 2017 can be found at www.vtbar.org under For Attorneys, VBA Publications, link: <https://www.vtbar.org/UserFiles/files/VBASpringJournal-Ir.pdf>.

² *Balkan Insight*, "Kosovo Organ-Trafficking: How the Claims Were Exposed," September 4, 2015.

³ Madame Prosecutor. *Confrontations with Humanity's Worst Criminals and the Culture of Impunity*, Carla Del Ponte, pp. 277-78.

⁴ *Id.*

⁵ *The Guardian*, "Former War Crimes Prosecutor Alleges Kosovan Army Harvested Organs from Serb Prisoners," by Ian Traynor, editor, <https://www.theguardian.com/world/2008/apr/12/war-crimes.kosovo>.

⁶ *Inhuman Treatment of People an Illicit Trafficking in Human Organs in Kosovo*, Dr. Dick Marty, Parliamentary Assembly, December 12, 2010, full report at: <http://www.assembly.coe.int/CommitteeDocs/2010/ajdoc462010prov.pdf>.

⁷ <https://www.theguardian.com/world/2010/dec/14/kosovo-prime-minister-like-mafia-boss>

⁸ *Statement of the Chief Prosecutor of the Special Investigative Task Force*, Williamson at Brussels, 29 July 2014, http://www.hlc-rdc.org/wp-content/uploads/2014/07/Press_release_EN.pdf

⁹ *Id.* at ¶ 1.

¹⁰ *Id.* at ¶s 1-2.

¹¹ *Id.* at ¶ 3.

¹² *Id.*

¹³ <https://www.euractiv.com/section/enlargement/news/kla-guerrillas-harvested-murdered-serbs-organs-say-eu-investigators/>

¹⁴ *Statement of the Chief Prosecutor of the Special Investigative Task Force*, at ¶ 4.

¹⁵ As described in my prior article. The Vermont Bar Journal, Spring 2017 can be found at www.vtbar.org under For Attorneys, VBA Publications, link: <https://www.vtbar.org/UserFiles/files/VBASpringJournal-Ir.pdf>.

¹⁶ "Kosovo's New War Court: How Will it Work?," Marija Ristic, *Balkan Insight*, August 6, 2015, <https://balkaninsight.com/2015/08/06/how-will-special-kosovo-court-work-08-05-2015/>.

¹⁷ "World's Eyes on Kosovo Amid Push to Halt War Crimes Court," *New York Times*, 1/13/18 <https://www.nytimes.com/2018/01/13/world/europe/kosovo-war-crimes-court.html>.

¹⁸ Speech by Specialist Prosecutor David Schwendiman at the Grotius center of Leiden University in The Hague, Thursday 22 March 2018: *Reflections on My Time as Specialist Prosecutor and Challenges Ahead*, https://www.scp-ks.org/sites/default/files/public/content/specialist_prosecutor_david_schwendiman_grotius_centre_speech_22_march_2018_0.pdf, at p.5.

¹⁹ *Id.* at 24.

²⁰ "'Ghost Court' Delays Justice for Kosovo War Victims," Dean Pineles, *Balkan Insight*, March 19, 2018; <https://balkaninsight.com/2018/03/21/ghost-court-delays-justice-for-kosovo-war-victims-03-19-2018/>

²¹ *Id.*

²² *Balkan Investigative Reporting Network*, "Step Towards Justice or Potential Timebomb?" by Aidan Hehir, January 2019; <https://balkaninsight.com/wp-content/uploads/2019/01/step-towards-justice-or-potential-timebomb.pdf>.



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IN MEMORIAM

David Burrows Stackpole

David Burrows Stackpole, born October 19, 1933 died peacefully on February 16, 2020 at the age of 86, surrounded by his loving family. David grew up in Johnson and graduated from People's Academy in Morrisville. He attended Dartmouth College and Cornell Law School. Upon graduating he returned to Vermont where he clerked in Lamoille County until he passed the Vermont bar exam. In 1964 David was the first attorney to set up private practice in Stowe, where he settled and raised his family. From 1968-1978 he partnered with his longtime friend, Tom Amidon and in 1993, he formed the current Stackpole & French Law Offices with Ed French. David served the VBA on various committees, including the Professional Conduct Committee. He served as States Attorney for Lamoille County, Trustee of the Village of Stowe and was the Moderator of Stowe Town Meeting for 20 years. He was a past President of Stowe Rotary Club, served as a founding director and officer of Lamoille County Mental Health, was a director of Lamoille Family Center, and former chair of the Johnson State College Foundation. He enjoyed years of serving on the Mount Mansfield Ski Patrol. He was involved in community theater and was instrumental in the birth of the Farm to School movement. He became chairman of the board of Green Mountain Farm to School, Inc., a non-profit committed to delivering farm sourced foods to schools throughout northern Vermont. David retired in 2015, but never stopped giving wise counsel. David leaves two daughters, his sister and their families.

John C. (Jason) Newman

John C. (Jason) Newman, 69, passed away peacefully at his home in White River Junction, Vermont on March 15, 2020. Jason was born in Ohio, living in various places and internationally before settling in Washington, D.C. He graduated from Ohio University and obtained a law degree and master's in taxation from Georgetown University. He moved to Paris, France in 1979, and was admitted to the French bar in 1982 as a Conseil Juridique. He returned to Washington in 1984 and moved to Rutland, Vermont in 1995. He practiced law from the time he entered law school, first in Washington with the Antitrust Division of the Department of Justice, as a public defender and a tax attorney; in Paris, France as a tax attorney; and, finally, in Washington and Rutland, Vermont as an estate and trust attorney. For over 30 years, he maintained the French Tax and Business Guide, one of the most successful guides in

English on French taxation. Jason was an avid traveler and enjoyed tennis, hiking and kayaking. A member of the Shambhala community since the 1980's, Jason became a student of Chogyam Trungpa Rinpoche and practiced Tibetan Buddhism, and taught meditation programs for the rest of his life. Jason is survived by his daughters, stepsons, siblings, nieces and nephews and his loving companion for the past three years, Andrea Doukas, who provided great care and comfort during his final months.

Harvey Denison Carter, Jr.

Harvey Denison Carter, Jr. passed peacefully at the McClure Miller Respite House on March 21, 2020, after a long battle with Alzheimer's Disease. Harvey was born in New York City, on November 2, 1938, and was raised in Scarsdale, NY. Harvey was a graduate of The Choate School, Williams College and the Duke University School of Law. Before establishing a law practice in Bennington with R. Marshall Witten, Harvey served as an Assistant U.S. Attorney in Manhattan. He represented the Town of Pownal as a Republican in the 1970 legislative session that passed Act 250 and was instrumental in shaping the final version of Vermont's iconic environmental law. With his good friend and fellow legislator Thomas H. Foster, Harvey organized the Mt. Anthony Preservation Society in Bennington, and successfully conserved the region's signature mountain. Harvey returned to serve in Montpelier in 1984, as a Democratic Senator from Bennington County. In 1988, Harvey joined his beloved wife, Mary, as she pursued her graduate degree at Cornell University. After teaching environmental and land use law for many years at Williams College, University of Vermont and Vermont Law School, he was hired by Cornell to teach graduate courses on historic preservation law. Harvey was a willing and hard-working partner on Mary's sheep farm as he continued a limited law practice as long as health allowed. In 2009, Harvey was diagnosed with Alzheimer's disease. He kept his good cheer and gregarious ways, but struggled with day-to-day life. Harvey is survived by his wife, Mary Stannard Carter, two sons, his grandchildren, his stepdaughters and their families.

Thomas Jacobs, 74, died on April 1, 2020, after being stricken while bike riding. Born in Vermont, Tom graduated from UVM and received his JD from Suffolk Law School in Boston. He has spent several years on the Bennington Select Board, most recently serving as Chair. He was instrumental in moving the \$54 million Putnam Block project from an idea to a ground-breaking in August of 2019. For more than 20 years, he was with the law firm

Jacobs, McClintock & Scanlon and formed his own firm a decade ago. He practiced in the fields of estate planning, real estate and business law and spent many years as legal counsel for Southwestern Vermont Health Care. Tom was passionate about economic and community stability in the Town of Bennington and served on the Select Board, the School Board and in leadership positions on the boards of many nonprofit organizations. As an avid cyclist his most memorable adventures included riding in the L'etape du Tour in France, the Sacramento double century ride, mountain biking in Utah and biking the length of Vermont several times with friends. In earlier years he enjoyed the triathlon circuit with his family at the finish line proudly cheering him on. Tom generally enjoyed being outdoors with his family and friends, particularly his beloved wife of 52 years, Lee, and his grandchildren. He is survived by his wife, their two daughters and their families.

Carl A. Yirka

Carl A. Yirka, 68, passed away at his home in Strafford on April 4, 2020, almost two years after being diagnosed with neuroendocrine tumor (NET), a rare aggressive cancer. Carl was born on February 28, 1952 in Cleveland, Ohio, to Croatian parents who had recently arrived as refugees fleeing post-WWII Yugoslavia. Carl attended Columbia University where he majored in English, then attended library school at Case Western Reserve University, School of Library Science and moved to Indiana, where he attended law school. After obtaining his JD, Carl and family went back to New York City, where he passed his NY state bar and became associate director at New York Law School Library. He later came to Vermont and served for almost thirty years as the Director of VLS's Julien and Virginia Cornell Library. From 1997 to 2005, Carl was project director of the VLS-Petrozavodsk State University Law-Faculty Partnership where he and his VLS colleagues were charged with developing a legal clinic, an environmental law center, and a law library at Petrozavodsk State University in Karelia, Russia. In 2005, Carl became a Fulbright Scholar in Croatia, teaching U.S. Constitutional Law at the University of Rijeka Faculty of Law. Carl and his second wife, Micki Colbeck, lived in and visited Croatia many times over their 22 years together. He enjoyed bike riding, dancing, reading and collecting books and gathering and studying the stories of his family's struggles through WWII in Eastern Europe. Carl is survived by his wife, Micki, two children, two stepchildren and their families.



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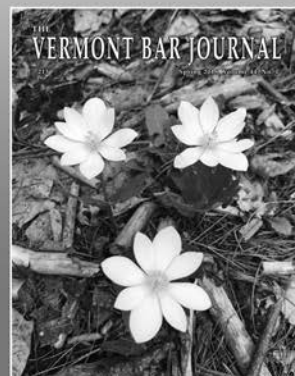
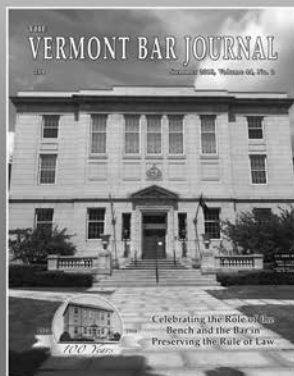
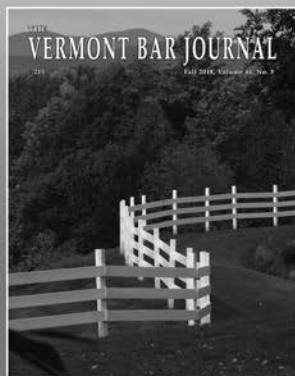
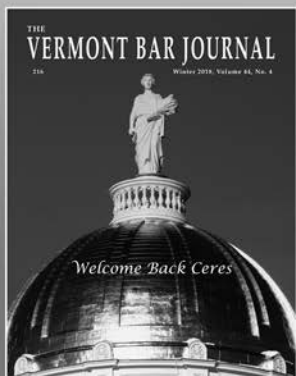
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